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IN THE

Supreme Court of the United States

GANGI BROS. PACKING COMPANY, 7-UP BOTTLING COMPANY OF PHILADELPHIA, INC., 7-UP BOTTLING COMPANY OF SAN FRANCISCO, SOUTHEASTERN SPECIALTY FOODS CORP., TRANS-PACKERS SERVICES CORP., and VARNI BROTHERS CORPORATION, dba SEVEN-UP BOTTLING OF MODESTO, on behalf of themselves and all others similarly situated,

Petitioners,

v.

CARGILL, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Ordinarily, the inferences to be drawn from circumstantial evidence are to be viewed in the light most favorable to the party opposing a motion for summary judgment. *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) established special rules applicable to summary judgment motions in certain antitrust cases. Where *Matsushita* applies, a defendant may present evidence refuting the adverse inferences that would otherwise be drawn from the circumstantial evidence; those adverse inferences may not then be drawn, and summary judgment may then be granted, unless the plaintiff is able to present evidence that tends to exclude the possibility that the defendant's conduct was the result of non-concerted lawful action. However, in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992), the Court refused to apply *Matsushita*'s special summary judgment standard where the antitrust claim was not implausible and the defendant's conduct was not inherently procompetitive.

The question presented is whether *Matsushita's* special summary judgment standard applies in cases where (as in *Kodak* but unlike *Matsushita*) the antitrust claim asserted by the plaintiff is neither implausible nor based on conduct by the defendant that is inherently procompetitive.

PARTIES TO THE PROCEEDING

1. Gangi Bros. Packing Company, 7-Up Bottling Company of Philadelphia, Inc., 7-Up Bottling Company of San Francisco, Southeastern Specialty Foods Corp., Trans-Packers Services Corp., and Varni Brothers Corporation, U.S. soft drink bottlers and food processors that purchase citric acid, are the Petitioners here and were the Plaintiffs and class representatives below.

2. Cargill, Inc., a U.S. manufacturer of citric acid, is the Respondent here and was the Defendant below.

3. Archer Daniels Midland Company ("ADM"), Jungbunzlauer International AGL ("JBL"), F. Hoffman-La Roche, Ltd. ("HLR"), Haarman & Reimer Corp. ("H&R"), U.S. and foreign manufacturers of citric acid, were Defendants in the District Court. Plaintiffs' claims against ADM, JBL, HLR and H&R were resolved prior to briefing in the Court of Appeals.

4. Coopers & Lybrand, L.L.P., a non-party in the District Court from which records were sought to be obtained, was made a party to the appeal in the Ninth Circuit on the limited issue of whether it was required to produce documents of an affiliated Swiss entity.

RULE 29.6 DISCLOSURE

None of the Petitioners has a parent company and no publicly held company owns 10% or more of the shares of stock of any Petitioner.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, as entered on September 1, 1999, is reported at 191 F.3d 1090 and is reprinted in the Appendix at pages A1–A32. The opinion of the Court of Appeals denying rehearing and rehearing *en banc* is reprinted in the Appendix at page A67. The opinion of the District Court granting summary judgment is reported at 996 F. Supp. 951 (N.D. Cal. 1998) and is reprinted in the Appendix at pages A47–A66. The opinion of the District Court granting class certification is reported at 1996 U.S. Dist. LEXIS 16409 (N.D. Cal. Oct. 1, 1996), and is reprinted in the Appendix at pages A33–A46.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was entered on September 1, 1999. App. A1. The Court of Appeals denied Petitioners' timely petitions for rehearing and rehearing *en banc* on October 21, 1999. App. A67. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

This case concerns Section 1 of the Sherman Act, 15 U.S.C. §1 (A69).

STATEMENT OF THE CASE

A. Statement Of Facts.

This case involves an international price-fixing and market allocation conspiracy between domestic and foreign producers of citric acid. Citric acid is used worldwide in foods, beverages, detergents, cleaning products, cosmetics, pharmaceuticals and industrial applications. In the early 1990s, a relatively small number of companies, including ADM, HLR, JBL and H&R, produced most of the citric acid sold commercially throughout the world. In 1996 and 1997, those four producers and their officers pled guilty to participating in an international conspiracy to fix prices and allocate sales volumes of citric acid. Subsequently, the initial four Admitted Conspirators settled civil cases brought by Plaintiffs against them and Cargill.

Cargill did not settle and denied it had ever joined the conspiracy. In the summary judgment motion it filed, it relied heavily on deposition testimony by the CEO of Admitted Conspirators H&R (Hans Hartmann), which it claimed showed there were only four conspirators. While the appeal was pending, however, a fifth citric acid manufacturer, Cerestar, and one of its officers refuted Cargill's "Group of Four" theory by admitting that Cerestar, too, had participated in the conspiracy.

The initial four conspirators admitted participating in the conspiracy from mid-1991 to mid-1995,[1] while Cerestar participated from late 1992 to mid-1994. These "Admitted Conspirators" admitted that "[t]he purpose of the scheme was to restrict the output and raise the price of citric acid in the United States and elsewhere."

The conspirators formed a trade association for European producers (ECAMA), which they used in part as a cover for their conspiratorial activities. Members reported

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[1]The conspiracy ended in June 1995, when the Justice Department announced its investigation.

confidential sales figures to ECAMA, which its Swiss auditors verified through on-site inspections of members' confidential business records. Detailed and accurate information about members' sales was needed to police the market share allocation part of the conspiracy.[2]

Cargill began producing citric acid in 1990. Until mid-1993, it competed with the Admitted Conspirators. It brought new capacity on stream, marketed vigorously, undercut Admitted Conspirators' prices and, by 1993, had earned a 22% market share in the U.S.—all to the Admitted Conspirators' great annoyance. Indeed, its entry into the market in 1990 had caused a price slump. Further, its competitive conduct took market share away from the Admitted Conspirators and put downward pressure on pricing, undermining the conspiracy.

In 1991, the Admitted Conspirators began recruiting Cargill into ECAMA. Although Cargill did not produce citric acid in Europe and thus was not eligible for membership, the Admitted Conspirators changed ECAMA's bylaws to eliminate that obstacle and pressed Cargill to join. Several known conspirators—employees of H&R and HLR who have been identified as participants—recruited Cargill. The recruitment lasted more than a year until finally, in late 1992, Cargill informed ECAMA's Chairman (a major player in the conspiracy) that if the "terms of membership" could be agreed upon, it would join. Thereafter, ECAMA members voted unanimously to invite Cargill to join, and an HLR executive (also a participant in the conspiracy) flew from Europe to the United States for the sole purpose of discussing with Cargill its joinder in ECAMA. Cargill officially joined ECAMA in May, 1993.

Until then, Cargill had been able to compete with the

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[2]Although the auditing firm was part of an international organization (Coopers & Lybrand) with offices in the U.S., it refused to produce its records in response to a subpoena served on its U.S. affiliate. *See* note 4, *infra*.

Admitted Conspirators for market share without substantially eroding the prices set by the conspirators. By the time it decided to join ECAMA, however, the U.S. market had weakened. Chinese producers had entered the market and were expanding their market share and selling at prices far below those set by the conspirators. The Chinese threatened the conspiracy and the high prices it had managed to sustain.

When Cargill joined, ECAMA's entire membership consisted almost entirely of the Admitted Conspirators. ECAMA's Chairman was a high-level participant in the conspiracy. ECAMA meetings were regularly attended by representatives of the Admitted Conspirators, who personally participated in the conspiracy. Price-fixing and sales volume allocation meetings were often held in conjunction with ECAMA meetings.

After announcing it would join ECAMA, Cargill pursued a strategy described in its *own internal documents* as one of "[s]electively compet[ing] at strategic accounts" while generally "[s]upport[ing] industry price increase[s]." It increased its own prices in tandem with the Admitted Conspirators. Cargill also dramatically scaled back its plans to double its U.S. production capacity and abandoned plans to acquire production capacity in Europe. Most telling, Cargill's market share, which until 1993 had risen meteorically, dipped slightly and then remained flat. Cargill attended numerous ECAMA meetings with representatives of the Admitted Conspirators who were key participants in the conspiracy. Cargill provided confidential sales data and submitted to audit by ECAMA's Swiss auditors—a process whose only rational purpose was to facilitate policing of the conspiracy.

In documents from related criminal proceedings that first became available while the appeal was pending, Barrie Cox, an ADM executive deeply involved in the conspiracy, revealed information directly contradicting Cargill's denials that it fixed prices or participated in the conspiracy:

> "Between 1992 and 1995, COX had approximately a dozen conversations with [Cargill National Sales Manager for citric acid] BILL GRUBER of Cargill on what COX called a 'day-to-day level' regarding pricing for specific accounts. . . . In each of these conversations, COX and GRUBER discussed what each would be bidding on particular CA [citric acid] accounts, including, Lever, Schreiber, M&M Mars, Coca-Cola, and P&G (Proctor and Gamble)." (*See* App. A70)

Cox stated that these discussions "usually occurred toward the end of the year when contracts came up for renewal." *Id.* Cargill and ADM "would bid at close to the same price, but not the identical price, as that would look suspicious." *Id.*[3]

Further, Gruber called Cox when Cargill "was considering leading a CA price move . . . to see if ADM would be supportive." *Id.* Cox also admitted that the Admitted Conspirators how to "get messages to Cargill" during the conspiracy period that it should "back off" and "not rock the boat," and that ADM agreed to get the message to Cargill. App. A71. Cox also admitted discussing with Gruber, at a time when the market had "started to flatten out," that each of the companies would have to "'absorb some of the hurt.'" This evidence strongly suggested that, at a minimum, Cargill participated in the conspiracy via communications with Admitted Conspirator ADM.

The Admitted Conspirators viewed Cargill as a member of the conspiracy. An internal document from the files of Admitted Conspirator H&R dated 1994, which expressed

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[3]As the Justice Department officials have observed, a significant feature of the international cartels like those it uncovered in citric acid has been not only agreed upon prices and market share allocations on a world wide and country-by-country basis, but also agreement on "prices to be charged (or bid) to specific customers." Statement of Joel I. Klein on International Antitrust Enforcement before the Subcomm. on Antitrust, Business Rights and Competition of the Senate Comm. on the Judiciary (May 4, 1999) ("Klein Statement").

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concerns that the supply of citric acid was "in significant excess over demand" with resulting "downward pressure on price," stated as an action item that H&R would seek to "gain share at accounts *where [it] has no significant effect on ADM, Cargill, JBL share.*" [redacted] The inference from this evidence was that H&R intended to avoid competing for market share with, and therefore to preserve the agreed-upon volume allocations of, the other conspirators—*including Cargill.*

B. Proceedings Below.

These consolidated civil antitrust class actions were brought in 1995 by Plaintiffs (U.S. soft drink bottlers and food processors that purchase citric acid) against ADM, JBL, HLR, H&R and Cargill—all of which are U.S. or foreign manufacturers of citric acid. Plaintiffs alleged that Defendants engaged in an international conspiracy to fix prices and allocate market share for sales of citric acid, in violation of Section 1 of the Sherman Act. The actions were consolidated by the Judicial Panel for Multidistrict Litigation and assigned to the Northern District of California. The District Court thereafter certified a class. In late 1996, Plaintiffs entered settlements with ADM, HLR, H&R and JBL, which were approved by the District Court.

After these cases were filed, and while an FBI investigation and criminal proceedings focused on the citric acid and related conspiracies were underway but far from complete,[4] Cargill sought summary judgment. It relied on

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[4]Given the pendency of the FBI investigation and criminal proceedings, discovery in this case was fraught with difficulty. The depositions of all but one of the individuals affiliated with the Admitted Conspirators were fruitless because the executives and employees of the Admitted Conspirators asserted the Fifth Amendment privilege against self-incrimination. Further, most of the potential witnesses were located outside of the United States, including the accounting firm that had audited the sales volume data of the ECAMA members and communi-

(continued . . .)

denials by Cargill executives and employees of any participation in the conspiracy and on the deposition testimony of Hans Hartmann (the former President of Admitted Conspirator HLR, who had himself pled guilty) in which he claimed to be unaware of any Cargill presence (or the presence of anyone other than ADM, HLR, H&R and JBL) at conspiratorial meetings and referred to the conspirators as a "group of four."

Relying heavily on Hartmann's testimony about the "group of four" and the lack of "direct evidence that Cargill was involved in [the] conspiracy" (App. A53), the District Court granted Cargill's motion and entered judgment for Cargill. Plaintiffs timely appealed to the United States Court of Appeals for the Ninth Circuit.

While the appeal was pending, there were significant developments in the related criminal proceedings, and both Plaintiffs and Cargill requested that the Court of Appeals take judicial notice of new evidence developed in connection with the criminal cases, which it did. *First*, a fifth manufacturer of citric acid, Cerestar, was indicted and almost immediately pled guilty to criminal price fixing. Cerestar's admission of guilt completely undercut Hartmann's testimony suggesting that the conspiracy was limited to a "group of four" consisting only of ADM, H&R, HLR and JBL. Further, since Hartmann had testified that the latter four were the only companies to send representatives to the price fixing meetings he attended, Cerestar's plea suggested either that Hartmann had lied or that it was possible to participate in the conspiracy while keeping the *appearance* of arms length from it—*i.e.*, through conversations with individual members of the conspiracy rather than attendance at the large group meetings.

(. . . continued)
cated with them about the audit. That firm, which was located in Switzerland, refused to produce any documents, and the District Court and the Ninth Circuit declined to require its U.S. affiliate to obtain and produce the requested information.

Second, in a sentencing memorandum filed with a District Court in Illinois, it was revealed that a high level executive of Admitted Conspirator ADM who was deeply involved in the conspiracy had a series of conversations with Cargill's National Sales Manager for citric acid during the conspiracy period in which the two rigged bid prices for key citric acid accounts and thereby allocated those accounts. *See* pp.4-5, *supra*.

Despite the strong circumstantial evidence of Cargill's participation in the conspiracy, the Ninth Circuit affirmed the grant of summary judgment. In doing so, it relied on *Matsushita* (App. A4-A5), and repeatedly accepted Cargill's proffered explanations for its conduct and for other items of evidence over the reasonable inference of conspiracy that Plaintiffs requested be drawn.[5] Notably, Cargill had no explanation for the price fixing ADM-executive Cox

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[5]*See, e.g.*, App. A14-A15 (rejecting inference that detailed and highly specific data in Cargill's files regarding market shares of its competitors was provided by ECAMA or co-conspirators for policing the volume allocation agreement, in favor of Cargill's unsupported assertion that the data had been generated through its own market research); App. A16-A17 (rejecting inference that Cargill was wooed to and did join *European* trade association (ECAMA)—despite that it never produced or sold citric acid in Europe—in order to join the international conspiracy, in favor of Cargill's contention that it joined because it desired to enter European market); App. A18-A19 (rejecting inference that Cargill scaled back by half its previously publicized plan to expand production of citric acid because it had joined conspiracy and ceased competing for market share, in favor of Cargill's unsupported assertion that it simply changed its mind and decided full expansion would cause price war); App. A19-A22 (rejecting evidence contained in expert report showing Cargill's market share flattened after 1992, in favor of inference from internal H&R memos reporting sporadic incidents of competition by Cargill thereafter that Cargill generally continued to compete for market share); App. A23-A24 (rejecting inference from Admitted Conspirators' price lists found in Cargill's files, including one received on date issued, that Cargill was exchanging price information with other conspirators, in favor of Cargill's assertion that it obtained competitor price lists from customers); App. A24-A25 (rejecting inference from H&R 1994 memo indicating that despite oversupply problem it would not compete with ADM, JBL *or Cargill* that Cargill was viewed as and *was* member of conspiracy, in favor of Cargill's speculative assertion that H&R's reason for not competing with Cargill was its prior lack of success).

admitted he and Cargill's Gruber engaged in, other than to deny that it occurred. Nonetheless, the court dismissed this evidence on the ground that it failed to show that Cargill was part of the "group of four" companies that attended the large group meetings of the Admitted Conspirators and thus was not probative of whether Cargill participated in the industrywide conspiracy. *See* App. A26-A27.

The court declined to apply the rule of an earlier Ninth Circuit case that it was improper on summary judgment to reject circumstantial evidence that supports an inference of conspiracy in favor of explanations suggesting innocent conduct unless drawing the inference of conspiracy would significantly deter beneficial procompetitive conduct. *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig.*, 906 F.2d 432 (9th Cir. 1990) ("*Petroleum Products*"). The panel dismissed the *Petroleum Products* analysis as "dicta." App. A9-A10.[6]

More importantly, the court failed even to *mention* the *Kodak* decision (*Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992)), in which this Court similarly held that the *Matsushita* "presumption in favor of summary judgment for the defendant" (504 U.S. at 478), applies only where (a) the plaintiff's evidence consists of conduct by the defendant "that appears always or almost always to enhance competition" (*id.* at 479) and inferring an antitrust violation from it would thus pose "a significant risk of

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[6]The panel's explanation for its rejection of *Petroleum Products*—that its discussion of the treatment of circumstantial evidence in a summary judgment context was dicta—was ill-considered and incorrect. In fact, the *Petroleum Products* court's discussion of the summary judgment standard in a circumstantial evidence case was a considered and detailed holding that it stated was "crucial to a proper resolution of th[at] case" (906 F.2d at 437), as is further evidenced by its comprehensive articulation of the standard (*id.* at 437-41) and its application of that standard to the evidence before it (*id.* at 441-65). The refusal of the panel to follow *Petroleum Products* violated the Ninth Circuit's rule that where a panel wishes to depart from prior Circuit precedent it must call for an en banc review. *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1478-79 (9th Cir. 1987) (en banc).

deterring procompetitive conduct" (*id.* at 478), and (b) the plaintiffs' theory "ma[kes] no practical sense, [is] 'speculative,' and [is] not 'reasonable.'" *Id.* at 468.

In their Petition for Rehearing and Suggestion for Rehearing En Banc, Plaintiffs pointed out the Court's failure to consider *Kodak* and its application of a summary judgment standard that is inconsistent with the one prescribed by this Court in *Kodak*.[7] The Ninth Circuit panel finally addressed *Kodak*, but gave it short shrift. The panel purported to distinguish *Kodak* as relating to "tying and market power" and not "the sufficiency of evidence of conspiratorial acts alleged under §1 of the Sherman Act." App. A68. The petition for rehearing and rehearing en banc were thus summarily denied. *Id.*

REASONS FOR GRANTING THE PETITION

In *Matsushita*, the plaintiffs asserted a decades long predatory pricing conspiracy that the Court found was "economically senseless"; moreover, they sought an inference of conspiracy from inherently procompetitive activities such as price cutting and rebates. In that context, this Court held that the defendants were entitled to summary judgment unless the plaintiff "present[ed] evidence that `tend[ed] to exclude the possibility' that the alleged conspirators acted independently." 475 U.S. at 588, 597-98. *Matsushita* did not decide whether the summary judgment burden it articulated applied in all antitrust cases or only in those cases in which the plaintiffs' theory was "implausible" and the requested inferences of unlawful conduct were predicated on inherently procompetitive conduct. Six years later, in *Kodak*, this Court answered that question, holding that the "presumption in favor of summary judgment" *Matsushita* applied only

[7]Plaintiffs had previously cited *Kodak* in both their opening and reply briefs.

governs antitrust cases in which the theory alleged is implausible and the inferences sought to be drawn are based on procompetitive conduct, and that absent such circumstances the ordinary summary judgment rules apply. 504 U.S. at 467-71, 478-79.

It is uniformly agreed that in cases like *Matsushita*—that is, in which the defendants lack a rational motive to violate the antitrust laws or for other reasons the plaintiffs' antitrust theory is implausible (475 U.S. at 587) and the inference of unlawful conduct is based on activities that are inherently procompetitive (*id.* at 594)—the plaintiffs "must come forward with more persuasive evidence to support their claim than would otherwise be necessary." *Id.* at 587, 593. However, there remains a profound split among the lower courts as to whether, in cases where the antitrust theory asserted *is* plausible and the activities challenged are facially *anti*competitive, ordinary summary judgment standards apply.[8] *Kodak* should have ended this discussion, for it resolved that question in the affirmative: it held that a defendant in an antitrust case "bears a substantial burden" and must demonstrate that an inference of unlawful conduct is "unreasonable" to obtain summary judgment. 504 U.S. at 469. It further held that when the preconditions of *Matsushita* are not met, ordinary summary judgment standards govern. *Id.* at 468-70.

The Seventh and Third Circuits have faithfully applied *Kodak*, employing ordinary summary judgment standards in all antitrust cases except those based on "economically senseless" theories and procompetitive conduct. The Ninth

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[8]Commentators have noted the confusion in the lower courts regarding the summary judgment standard applicable in antitrust cases. *See, e.g.*, *The Supreme Court: Leading Cases*, 106 HARV. L. REV. 163, 328, 337 (1992); McQueen, *Comment: The Summary Judgment Standard in Antitrust Conspiracy Cases and In re Travel Agency Commission Antitrust Litigation*, 62 J. AIR. L. & COM. 1155, 1157, 1172, 1174, 1193-94 (1997); Hughes, *The Left Side of Antitrust: What Fairness Means and Why It Matters*, 77 MARQ. L. REV. 265, 284 (1994).

Circuit, too, had adopted a rule consistent with *Kodak* even before this Court decided that case. However, other circuits, and in this case a different panel of the Ninth, have disregarded or purported to distinguish *Kodak* and held that the *Matsushita* standard applies *irrespective* of whether the plaintiff's theory is plausible or rests on procompetitive conduct. Some have imposed standards even more stringent than that articulated in *Matsushita*, making it virtually impossible for a plaintiff to withstand summary judgment in a circumstantial evidence case.

Enforcement of the antitrust laws is crucial to the integrity of domestic markets. Without it, anticompetitive activities such as the price fixing and volume allocation conspiracy in this case, which drive up the prices of literally thousands of products purchased by American businesses and consumers, would be allowed to go undeterred and unremedied. Indeed, large-scale anticompetitive cartels between major international companies like those involved in this case have flourished in recent years, as the criminal prosecutions and civil litigation involving lysine, fructose, potash and vitamins (to name a few) show.[9]

Although the criminal division of the Justice

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[9]*See* Klein Statement, *supra*, at 3-4 (massive international cartels in "citric acid, lysine (important livestock and poultry feed additive), sodium gluconate (industrial cleaner), and graphite electrodes (used in steel making)); *see, e.g.*, *In re Methionine Antitrust Litig.*, MDL No. 1311, 1999 U.S. Dist. LEXIS 19206, at *1-2 (J.P.M.L. Dec. 8, 1999) (amino acid used in animal feed); *In re Vitamin Antitrust Litig.*, MDL No. 1285, 1999 U.S. Dist. LEXIS 8599, at *1-2 (J.P.M.L. June 7, 1999), 1999 U.S. Dist. LEXIS 12405, at *1-4 (D.D.C. July 29, 1999) (vitamins, vitamin derivatives, and vitamin premixes); *Blomkest Fertilizer, Inc. v. Potash Corp., Inc.*, 176 F.3d 1055, 1074 (8th Cir. 1999), *reh'g en banc granted* (July 16, 1999) (mineral used in agricultural fertilizers); *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 602-03 (7th Cir. 1997) (prescription drugs); *In re Abbott Labs. Antitrust Litig.*, 51 F.3d 524, 525 (5th Cir. 1995) (infant formula); *In re Medical X-Ray Film Antitrust Litig.*, No. CV 93-5904, 1997 U.S. Dist. LEXIS 21936, at *2-3 (E.D.N.Y. Dec. 10, 1997) (x-ray film); *In re Plastic Cutlery Antitrust Litig.*, No. 96-CV-728, 1998 U.S. Dist. LEXIS 3628, at *3-4 (E.D. Pa. March 20, 1998) (plastic cutlery).

Department has devoted one third of its staff to investigating such international cartels and has succeeded in prosecuting a number of companies involved in them, it has described those prosecutions as reaching "just the tip of the iceberg." Klein Statement, *supra*, at 4. As this Court has recognized, in enacting the antitrust laws Congress intended that private lawsuits would serve "as a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979).[10]

The confusion over the summary judgment standard and the willingness of many lower courts to dismiss antitrust cases at the summary judgment stage despite credible evidence of a violation deter private lawsuits and undermine effective enforcement of the antitrust laws. This is particularly so with respect to violations that span international borders. The increased complexity of such cases, in which key witnesses and documents are often located beyond U.S. subpoena power, makes them extremely difficult and expensive to prove. When the vagaries of an ill-defined summary judgment standard are added to these hurdles, international conspiracy cases become extremely unattractive to bring unless the Justice Department has already investigated and prosecuted them successfully.

Yet international cartels "pose an even greater threat to American businesses and consumers than domestic conspiracies, because they tend to be highly sophisticated and extremely broad in their impact—both in terms of the geographic scope and in the amount of commerce affected by the conspiracy." *Prepared Testimony of Joel I. Klein Before the Subcomm. On Antitrust of the Senate Comm. On the Judiciary*, FED. NEWS SERV., Feb. 26, 1998, at 5.

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[10] *Accord, California v. American Stores Co.*, 495 U.S. 271, 284 (1990); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985); *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 572-73 n.10 (1982).

Effective enforcement of the antitrust laws against companies whose activities affect U.S. markets is "central to the functioning of our economy." *Id.* at 1; *see also United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 3-4 (1st Cir. 1997), *cert. denied*, 522 U.S. 1044 (1998).

For these reasons, the Court should grant review in this case to resolve the split between the circuits and to clarify that the conventional summary judgment standard applies in antitrust cases not predicated on implausible theories or procompetitive behavior, and that the more stringent test articulated in *Matsushita* applies only in cases asserting implausible claims based on procompetitive activities.

I.

THE NINTH CIRCUIT PANEL ADOPTED AND APPLIED A SUMMARY JUDGMENT STANDARD THAT IS INCONSISTENT WITH THIS COURT'S HOLDING IN *KODAK*.

A. In *Kodak*, This Court Clarified *Matsushita*, Stating That An Extraordinary Showing Was Required Of The Plaintiffs In That Case Because Their Antitrust Theory Was "Economically Senseless" And Predicated On Beneficial Procompetitive Conduct.

In *Matsushita*, this Court addressed the summary judgment standard in the context of an alleged predatory pricing conspiracy. Since the plaintiffs' theory—that the defendants charged below-cost prices for an extended period on the uncertain hope of future profits derived from driving competitors out of the market—"ma[de] no economic sense,"[11] the Court held that the plaintiffs were required to

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[11]Indeed, the Court found that the defendants "as presumably rational businesses, . . . had every incentive *not* to engage in the conduct with which they [were] charged, for its likely effect would be to generate losses for [defendants] with no corresponding gains." 475 U.S. at 595.

"come forward with more persuasive evidence in support of their claim than would otherwise be necessary." 475 U.S. at 587. The Court also held that to withstand summary judgment the plaintiff was required to "show that the inference of conspiracy [was] reasonable in light of the competing inferences of independent action." *Id.* at 588.

The Court emphasized that "court[s] should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct." *Id.* at 593. Deterring procompetitive conduct was a concern in *Matsushita* because the conduct that formed the basis of the plaintiffs' complaint—"cutting prices in order to increase business"—"often is the very essence of competition." *Id.* at 594. As the Court observed, "mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Id.* The Court found the balance between the concern about deterring procompetitive conduct and the desire to identify and punish illegal conspiracies "unusually one-sided" in *Matsushita* (*id.* at 594), in which the defendants "had no rational economic motive to conspire." *Id.* at 595-96. It therefore required the plaintiffs to present "evidence that is sufficiently unambiguous to permit a trier of fact to find that petitioners conspired to price predatorily for two decades despite the absence of any apparent motive to do so." *Id.* at 597. Such evidence, the Court held, "must 'ten[d] to exclude the possibility' that [defendants] underpriced [plaintiffs] to compete for business rather than to implement an economically senseless conspiracy." *Id.* at 597-98.

Following *Matsushita*, many lower courts read this Court's opinion very broadly, in one commentator's words: "view[ing] [its] bold language as an invitation to unconventionally examine plaintiffs' theories critically at an early

stage of the litigation."[12] Some interpreted *Matsushita* as holding that a special summary judgment standard applied in all antitrust cases[13]; many interpreted *Matsushita* to require that they weigh and choose between inferences of conspiracy or other unlawful conduct drawn from circumstantial evidence proffered by plaintiffs and inferences or evidence proffered by defendants to show their conduct was lawful.[14]

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[12]Judson, *Note: Kodak v. Image Technical Services: The Taming Of Matsushita And The Chicago School*, 1993 WIS. L. REV. 1633, 1664 (Nov./Dec. 1993); *see* 1 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 827-28 (4th ed. 1997); Calkins, *Supreme Court Antitrust 1991-92: The Revenge of the Amici*, 61 ANTITRUST L.J. 269, 298 (1993); DeSanti & Kovacic, *Matsushita: Its Construction and Application by the Lower Courts*, 59 ANTITRUST L.J. 609, 653 (1991); Susman, *Plaintiff's Strategies and Tactics—Pretrial and Trial*, 58 ANTITRUST L.J. 277, 277 (1989); H. HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE §16.8b (1994).

[13]2 I. SCHER, ANTITRUST ADVISOR §10.35, at 10-80 (4th ed. 1998); Katz & Arnold, *Eastman Kodak v. ITS: The Downfall of the Chicago School*, THE COMPUTER LAW., July 1992, at 2-3 (many lower courts accepted interpretation of *Matsushita* as imposing greater burden on plaintiffs in antitrust cases than in other types of cases); Protos, *Kodak v. Image Technical Services: A Setback for the Chicago School of Antitrust Analysis*, 43 CASE W. RES. L. REV. 1199, 1216 (1993); *see, e.g., H.L. Hayden Co., Inc. v. Siemens Med. Sys., Inc.*, 879 F.2d 1005, 1019 (2d Cir. 1989) (referring to "special hurdles" of "Monsanto-Matsushita rule"); *Helicopter Support Sys., Inc. v. Hughes Helicopter, Inc.*, 818 F.2d 1530, 1532-35 (11th Cir. 1987); App. A50 (district court opinion below) (referring to "special rule appl[icable] to the use of circumstantial evidence in antitrust cases"); *see also* Hofer, *The Practitioner Antitrust Law, Remarkable Recovery*, S.F. DAILY J., Dec. 13, 1999, at 5 ("The Court in *Monsanto* and *Matsushita* substantially increased the burden of proof required to prove the conspiracy or unlawful agreement element of Section 1 of the Sherman Act for plaintiffs who rely on circumstantial evidence to prove the unlawful agreement. Consequently, it became much more difficult for plaintiffs to survive summary judgment because most civil litigants do rely on circumstantial evidence").

[14]*See, e.g., Midwest Radio Co. v. Forum Pub. Co.*, 942 F.2d 1294, 1297-98 (8th Cir. 1991) ("When a valid business reason exists for the conduct alleged to be predatory or anti-competitive, that conduct cannot support the inference of a section 2 violation"); *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1456 (11th Cir. 1991) ("when the defendant puts forth a plausible, procompetitive explanation for his actions, we will not be quick to infer, from circumstantial evidence, that a

(continued . . .)

Further, the courts applied *Matsushita* to choose between conflicting inferences even in cases in which the antitrust theory was neither implausible nor based on conduct that was inherently procompetitive.[15] So frequently were summary judgment motions being granted in antitrust cases that some commentators suggested the lower courts were using *Matsushita* to clear their dockets rather than as a basis for analyzing the merits of antitrust claims.[16]

Six years after deciding *Matsushita*, this Court revisited "the standard for summary judgment in an antitrust controversy." *Kodak*, 504 U.S. at 454. The Court took that opportunity to clarify *Matsushita*, stating it was not intended to emasculate the traditional summary judgment standard or to replace it with a special standard imposing more stringent burdens on plaintiffs in antitrust cases. *Id.* at 468.

In *Kodak*, the Court explained that the plaintiffs' antitrust theory in *Matsushita* "made no practical sense, was 'speculative,' and was not 'reasonable.'" *Id.* at 468 (quoting and citing *Matsushita*, 475 U.S. at 588, 590, 593, 595, 597). It was in *that* context, the Court observed, that it had held the

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(. . . continued)
violation of the antitrust laws has occurred; the plaintiff must present more probative evidence that the law has been violated"); *Market Force, Inc. v. Wauwatosa Realty Co.*, 906 F.2d 1167, 1170, 1173-74 (7th Cir. 1990) (affirming summary judgment where plaintiff's evidence did "not foreclose the conclusion that the competitors were engaged in a conspiracy" and "left open the possibility of independent action," and where "even drawing the inferences in favor of [plaintiff], a conspiracy is not the 'compelling, if not exclusive, rational inference' from the record"); *see also Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 659-61 (7th Cir. 1989) (summary judgment should be "favored practice" in antitrust actions and rejecting plaintiffs' evidence as "too speculative"); *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 878 F.2d 801, 804 (4th Cir. 1989) (requiring "clear evidence" of conspiracy).

[15]*See* cases cited in note 14, *supra*; 2 I. SCHER, ANTITRUST ADVISOR §10.35, at 10-80 (4th ed. 1998); 1 ANTITRUST LAW DEVELOPMENTS, *supra*, at 826-27 & nn.421-23 (and cases cited therein).

[16]*De Santi & Kovacic*, *supra*, 59 ANTITRUST L.J. at 653; Weber, *Summary Judgment After Kodak*, ANTITRUST 10 (Fall/Winter 1992).

case could not go to a jury unless the plaintiffs "came forward with more persuasive evidence to support their theory." *Id.* The Court distinguished the case before it from *Matsushita* because it disagreed with Kodak's contention that the plaintiffs' antitrust theory was "if not impossible, is at least unreasonable." *Id.* at 471; *see id.* at 477-78.

In *Kodak*, the Court also emphasized that the *Matsushita* plaintiffs had "attempted to prove the antitrust conspiracy 'through evidence of rebates and other price cutting activities'" that are "'the very essence of competition.'" *Id.* at 478. In that context, the Court had been "concerned that mistaken inferences would be 'especially costly' and would 'chill the very conduct the antitrust laws are designed to protect.'" *Id.* In the case before it, however, the Court noted, "the facts . . . are just the opposite. The alleged conduct—higher service prices and market foreclosure—is facially anticompetitive and exactly the harm that antitrust laws aim to prevent." *Id.* Because of the absence of the factors that drove the result in *Matsushita*, the Court held, "Matsushita does not create any presumption in favor of summary judgment for the defendant." *Id.* On the contrary, "[i]n this case, when we weigh the risk of deterring procompetitive behavior by proceeding to trial against the risk that illegal behavior will go unpunished, *the balance tips against summary judgment*." *Id.* at 479 (emphasis added). *Compare id. with Matsushita*, 475 U.S. at 594.

Kodak thus teaches that *Matsushita* does not apply unless the defendant shows that the inferences the plaintiffs seeks to have drawn are unreasonable and are based on conduct that "appears always or almost always to enhance competition." *See id.* at 469, 477, 479.

B. The Ninth Circuit Panel In This Case Disregarded *Kodak*'s Holding That Where The Plaintiffs' Antitrust Theory Is Neither "Economically Senseless" Nor Based On Beneficial Procompetitive Conduct, Ordinary Summary Judgment Standards Apply.

In this case, the Ninth Circuit panel applied a broadly construed version of the *Matsushita* standard that allowed it to weigh and choose between the Plaintiffs' and Defendant's evidence in a case in which there was an admitted price fixing and volume allocation conspiracy and the issue was whether the Defendant participated in it. As discussed above, the evidence showed not only parallel pricing by the defendant (Cargill), but also actual price fixing and allocation of accounts by Cargill with an Admitted Conspirator (ADM), the highly suspect decision by an Admitted Conspirator (H&R) to refrain from competing for market share with other Admitted Conspirators *and Cargill*,[17] extraordinary efforts by the Admitted Conspirators to recruit Cargill to join a trade association (and changing of its bylaws to allow Cargill, a non-European producer, to join) that was, at minimum, used as a cover for conspiratorial activities, and Cargill's announcement that it would join in that association and simultaneous and dramatic rollback of a publicly announced expansion of capacity. Regardless of Cargill's proffered explanations for some of these facts, it could not be said that drawing an inference from them that Cargill joined in the conspiracy is unreasonable. The only way the court could reach the result that it did was by applying a summary judgment standard different from that applicable in ordinary cases: one consistently crediting the defendant's proffered

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[17]Other courts have held that a company's decision to refrain from competing for a competitor's accounts constitutes a "plus factor" that tends to exclude the possibility of independent conduct and support an inference of conspiracy. *See, e.g., City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548, 572-73 & n.36 (11th Cir. 1998), *cert. denied*, 145 L. Ed. 2d 42 (1999); *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1245, 1246 (3d Cir. 1993).

explanations against reasonable competing inferences of conspiracy.

In engaging in such a weighing and choosing between the evidence under the auspices of *Matsushita*, the Ninth Circuit panel at first disregarded *Kodak* entirely. *See* pp.9-10, *supra*. In its published opinion, it made no effort to explain why the analysis prescribed in *Kodak* did not apply. It did not determine either that Plaintiffs' theory (that Cargill participated in the conspiracy) was "economically senseless" or that Cargill's conduct was inherently procompetitive. As a result of overlooking *Kodak*, the panel applied a summary judgment standard that this Court, in *Kodak*, held should *not* be applied in a case like this.

The panel's decision is directly contrary to *Kodak*. *First*, in failing to address whether the conspiracy alleged by the Plaintiffs was implausible, the Ninth Circuit applied a stringent version of the *Matsushita* standard when a necessary precondition to *Matsushita*'s application was not established. *Second*, the court neglected to consider whether a second precondition to *Matsushita* was met: whether the conduct of Cargill on which Plaintiffs' claim was based was procompetitive—*i.e.*, "appear[ing] always or almost always to enhance competition." 504 U.S. at 479. Under *Kodak*, unless the plaintiffs' theory is "economically senseless" and the conduct from which an inference of conspiracy is sought to be drawn is inherently procompetitive, the ordinary summary judgment standard must be applied. *See* pp.17-18, *supra*.

Neither of these preconditions for invoking *Matsushita*'s burden-shifting analysis existed in this case. Unlike the predatory pricing conspiracy alleged in *Matsushita*, a price-fixing and volume allocation conspiracy among the predominant manufacturers of a commodity like citric acid is not implausible; indeed, it is undisputed such a conspiracy took place between at least the five Admitted Conspirators. Nor can it be said that Cargill's participation—any more than ADM's, H&R's, JBL's, HLR's, and

later Cerestar's—was lacking a rational motive. To be sure, each would have to trade the ability to compete for more market share; but in exchange each would receive (1) a certain market share for which the other conspirators would not compete *and* (2) the benefit of steadily increasing above-market prices.

Further, the conduct by Cargill on which Plaintiffs relied to support an inference that it joined the conspiracy was not procompetitive in any sense. Charging above-market prices in tandem with the Admitted Conspirators cannot be characterized as procompetitive. Nor can Cargill's rigging of bids with Admitted Conspirator ADM. Likewise, it cannot be said that rolling back a previous, publicly announced expansion of capacity is "always or almost always [likely] to enhance competition."

Since neither the conspiracy nor Cargill's joinder of it was "economically senseless," and since Cargill's conduct was not inherently procompetitive, the Ninth Circuit erred in applying a stringent summary judgment standard derived from *Matsushita* and in weighing Cargill's proffered explanations of the facts against the competing reasonable inferences of conspiracy that could be drawn from Plaintiffs' evidence. This error will have grave consequences if not corrected: by neglecting to mention the *Kodak* case in its published opinion and failing to apply the summary judgment standard it prescribed, the panel sent a signal to all of the District Courts in this Circuit and beyond that, in its view, *Kodak* has no meaning and a stringent *Matsushita*-based summary judgment standard applies in all antitrust cases, making it virtually impossible for a circumstantial evidence case ever to survive summary judgment.

In its unpublished order denying rehearing, the panel finally acknowledged *Kodak* but sought to distinguish it, implying that a different summary judgment standard applies to tying and monopolization claims than to antitrust conspiracy claims. *See* App. A67-A68. But in *Kodak* this Court made plain that it was addressing "the standard for summary

judgment *in an antitrust controversy*" (504 U.S. at 454 (emphasis added))—not merely in a tying or monopolization context. If the Court had viewed the summary judgment standard for tying and monopolization claims as different from that applicable to conspiracy claims, it could simply have distinguished *Matsushita* on that ground. Instead, it revisited *Matsushita* and took great pains to explain the meaning and limits of its decision in that case. The North Circuit panel's summary dismissal of *Kodak* on the spurious ground that it was distinguishable only exacerbated the problem created by its published opinion.

II.

THERE IS A SHARP CONFLICT BETWEEN THE CIRCUITS CONCERNING THE STANDARD GOVERNING SUMMARY JUDGMENT IN ANTITRUST CASES.

A. The Third And Seventh (And Until Recently, Ninth) Circuits Have Followed *Kodak* And Held That Plaintiffs Need Only Make The Extraordinary Showing Demanded In *Matsushita* Where The Antitrust Claims Asserted Are Implausible And Based On Inferences Drawn From Beneficial Procompetitive Conduct.

The Third and Seventh (and until this case Ninth) Circuits have heeded *Kodak*. In *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224 (3d Cir. 1993), the Third Circuit considered the summary judgment standard applicable in antitrust cases in light of *Matsushita* and *Kodak*. *Petruzzi's* involved an alleged conspiracy to allocate customers in the fat and bone rendering industry. The customers were suppliers of raw materials, and it was alleged that the defendants conspired to avoid competing for accounts so as to keep the prices they paid the supplier-customers for raw materials artificially low.

Despite the circumstantial evidence plaintiffs had proffered to show that the defendants were engaged in such a conspiracy, the district court had granted summary judgment holding that evidence insufficient. *Id.* at 1229-30.

Reversing, the Court of Appeals addressed the summary judgment standard applicable in antitrust cases. *Id.* at 1230. In general, it observed, "'[a] non-movant's burden in defending against summary judgment in an antitrust case is no different than in any other case.'" *Id.* Further, it opined, "where the non-movant has put forward evidence which it contends allows for an inference of a section 1 violation, the movant defendant bears the burden of proving that drawing an inference of unlawful behavior is unreasonable." *Id.* In determining which inferences are reasonable and which are circumscribed, the court found it important to "examine closely the Supreme Court's decision in *Matsushita*." *Id.*

The Third Circuit found significant to this Court's decision in *Matsushita* this Court's (1) conclusion "that the defendants had no motive to engage in the alleged conspiracy," and (2) observation "that the alleged unlawful behavior was equally consistent with lawful behavior because 'cutting prices in order to increase business often is the very essence of competition.'" *Id.* at 1231. Thus, the court held,

> "[T]wo important circumstances underlying the Court's decision in *Matsushita* were (1) that the plaintiffs' theory of conspiracy was implausible and (2) that permitting an inference of antitrust conspiracy in the circumstances 'would have the effect of deterring significant procompetitive conduct.' [citing *Petroleum Products*, 906 F.2d at 439]. In particular, the *Matsushita* Court worried that if it allowed mistaken inferences to be drawn from the defendants' price-cutting policies, it would chill procompetitive behavior. *See Matsushita*, 475 U.S. at 594, 106 S. Ct. at 1360. Thus, the Court stated that the acceptable inferences which can be drawn from circumstantial evidence vary with the plausibility of the

> plaintiffs' theory and the dangers associated with such inferences." (*Id.* at 1232)

Citing *Kodak*, the Third Circuit emphasized that *Matsushita* "did not hold that an antitrust defendant is entitled to summary judgment merely by providing an economic theory to justify its behavior" but "simply stressed that to survive summary judgment in the absence of direct evidence or strong circumstantial evidence, a plaintiff must assert a theory that is plausible." *Id.* at 1231. The issue remains whether the inferences sought to be drawn are reasonable, and the focus is not on whether the *defendants* demonstrate a plausible rationale for their behavior, but rather whether the plaintiffs' evidence "'tends to exclude the possibility that the defendants were acting independently.'" *Id.* at 1232. Finally, when the plaintiffs' antitrust theory is not implausible and their inferences do not rest on procompetitive activities, "more liberal inferences from the evidence should be permitted than in *Matsushita* because the attendant dangers from drawing inferences recognized in *Matsushita* are not present." *Id.*

Applying that standard to the case before it, the Third Circuit reversed the district court's grant of summary judgment as to two of the defendants. *Id.* at 1233-47. In so ruling, it contrasted the case before it—in which "the plaintiff's theory of conspiracy [was] not implausible" and "the defendants' challenged activities [were] not procompetitive"—with the case this Court faced in *Matsushita*. *Id.* at 1232. It held the plaintiffs' circumstantial evidence was sufficient to raise a triable issue of fact. *Id.*

In decisions since *Petruzzi's IGA*, the Third Circuit has consistently interpreted *Matsushita* in the light of *Kodak* to impose a higher burden on the non-movant plaintiff on summary judgment in antitrust cases *only* when the plaintiff's theory is implausible and based on pro-

competitive activities by the defendant.[18]

The Third Circuit's interpretation of *Matsushita* was, until the decision in the instant case, similar to that in the Ninth Circuit. In *Petroleum Products*, the Ninth Circuit had similarly held that a court could not grant summary judgment to a defendant when the evidence was plausibly consistent with both inferences of conspiracy and inferences of innocent conduct *unless* drawing the inference would deter procompetitive conduct. 906 F.2d at 437-41. In so holding, it observed that "[i]n *Matsushita*, the Court was unwilling to permit an inference of predatory pricing in part because the Court was concerned about the inference's possible anticompetitive side-effects." *Id.* at 439. The Court's emphasis "on the dangers of permitting inferences from certain types of ambiguous evidence" was "key to the proper interpretation of *Matsushita*." *Id.*

In *Petroleum Products*, the Ninth Circuit held that under *Matsushita* a defendant in an antitrust case based on circumstantial evidence is entitled to summary judgment *only if*: "(1) the defendant's conduct is consistent with other plausible explanations, and (2) permitting an inference of conspiracy would pose a significant deterrent to beneficial procompetitive behavior." *Id.* at 440.[19] Further, the Ninth Circuit has recognized that whether a defendant's proffered explanations for its conduct should be accepted—at least where there is competing evidence—is a question of fact for the jury.[20]

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[18]*See, e.g., In re Baby Food Antitrust Litig.*, 166 F.3d 112, 124 (3d Cir. 1999); *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 466-67, 474 (3d Cir. 1998); *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1001 (3d Cir. 1994); *Advo, Inc. v. Philadelphia Newspapers, Inc.*, 51 F.3d 1191, 1196-97, 1205 (3d Cir. 1995).

[19]*See also Long Beach v. Standard Oil Co.*, 872 F.2d 1401, 1407 (9th Cir. 1989) (distinguishing *Matsushita* on ground that case before it was not based on "legitimate price competition" and did not involve "implausible" scheme).

[20]*See Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1477 (9th Cir.

(continued . . .)

As discussed above, the Ninth Circuit's decision in this case conflicts with *Kodak* and with *Petroleum Products*. The intracircuit conflict underscores the confusion in the lower courts about the meaning of *Matsushita*.

The Seventh Circuit, like the Third and formerly the Ninth, applies conventional summary judgment standards if the plaintiff's theory is plausible. In *JTC Petroleum Co. v. Piasa Motor Fuels, Inc.*, 190 F.3d 775, 778-79 (7th Cir. 1999), Chief Judge Posner described *Matsushita* as "teach[ing] that an antitrust claim which makes no economic sense can on that ground be dismissed on summary judgment" and held that even if there was "an innocent explanation for" the defendant's conduct, the issue on summary judgment was "whether a rational jury . . . could conclude (construing the evidence as favorably to the plaintiff as the record permits) that the reason for the [defendants' acts] was that they were [conspiring]." *Id.*

In another case, Chief Judge Posner reversed a district court's grant of summary judgment in an antitrust conspiracy case, rejecting the contention that defendants' proffered innocent explanations entitled them to summary judgment, opining:

> "But the issue before us is not whether the wholesalers were in fact participants in the price-fixing conspiracy; it is whether there is sufficient evidence of this to create a triable issue. In deciding this question we must construe the evidence as favorably to the plaintiffs as the record permits, not as favorably to the defendants as it permits. The defendants' interpretations may be correct; they are not inevitable." (*In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 614 (7th Cir. 1997), *cert. denied*, 522 U.S. 1153 (1998))

(. . . continued)
1997), *aff'd*, 525 U.S. 299 (1999); *High Tech. Careers v. San Jose Mercury News*, 996 F.2d 987, 992 (9th Cir. 1993) (reversing grant of summary judgment).

The court agreed with defendants that summary judgment would be proper even if there were some evidence of an antitrust violation "if the plaintiff's theory of violation makes no economic sense." *Id.* But in the case before it, there was a plausible conspiracy theory. *Id.* Whether it was true or not was "not the issue"; the question (which the court answered in the affirmative) was whether there was "enough evidence supporting it to preclude summary judgment." *Id.* In this context, the defendants' contrary evidence suggesting that they had not played a role in the conspiracy did "not erase the factual question of whether [they] joined the conspiracy. It is just evidence to be weighed in the balance by the trier of fact." *Id.* at 615; *see also id.* at 616.

B. Like The Ninth Circuit Panel In This Case, Courts In Other Circuits Have Chosen To Ignore *Kodak* And Continued To Read *Matsushita* As Requiring Plaintiffs' Evidence To Outweigh Defendants' Evidence To Survive Summary Judgment In All Antitrust Cases.

In stark contrast to the analysis of the Third and Seventh Circuits—and the former position of the Ninth—are the Ninth Circuit's decision in this case and recent decisions of the Fourth, Eighth and Sixth Circuits. Even after *Kodak*, these circuits have interpreted *Matsushita* to require weighing of evidence on summary judgment motions in antitrust cases and entry of summary judgment when the court views the evidence as in equipoise or favoring defendant. Disregarding *Kodak*, these circuits have applied this standard in *all* cases, regardless of the plausibility of the conspiracy theory alleged or whether the conduct at issue is procompetitive.

One example is the Fourth Circuit, which, citing *Matsushita*, held that "on summary judgment motions in antitrust cases, . . . when there is evidence of conduct *that is consistent with both legitimate competition and an illegal*

conspiracy, courts may not infer that an illegal conspiracy has occurred without other evidence." *Thompson Everett, Inc. v. National Cable Advertising, L.P.*, 57 F.3d 1317, 1323 (4th Cir. 1995) (citing *Matsushita* and omitting to mention *Kodak*) (emphasis added); *see also Merck-Medco Managed Care, LLC v. Rite Aid Corp.*, No. 98-2847, 1999 U.S. App. LEXIS 21487, at *21-22 (4th Cir. Sept. 7, 1999) (*Eastman Kodak* did not modify *Matsushita*). The Fourth Circuit standard goes *beyond Matsushita*: (1) The high threshold it sets for plaintiffs is not limited to situations in which the plaintiff's theory is inherently "implausible" or "economically senseless," or to cases in which the conduct complained of is procompetitive (such as price-cutting), but is established for all antitrust cases. (2) Even in *Matsushita*, the Court did not suggest that any plausible explanation proffered by the defendant for its conduct would entitle the defendant to summary judgment, but held only that where the inferences of conspiracy and innocence from particular conduct were *equally* plausible, the inference of conspiracy could not be drawn without more evidence (*Matsushita*, 475 U.S. at 588). Under the Fourth Circuit standard, if the conduct can be explained and thus an inference of innocence is even *possible*, the court is *required* to draw it. (3) Only if the plaintiff proffers evidence that not merely "tends to exclude" but, in the court's view *conclusively* excludes, the possibility of innocent conduct is there a triable issue of fact. The Fourth Circuit reading of *Matsushita* substitutes the judge for the jury and requires that the claim be dismissed whenever a jury *could* find for the defendant—even if it could also rationally find for the plaintiff.

Similarly, the Eighth Circuit has expressly rejected the Third and former Ninth Circuit approach, stating that it "read[s] *Matsushita* more broadly." *Corner Pocket of Sioux Falls, Inc. v. Video Lottery Techs., Inc.*, 123 F.3d 1107, 1109 (8th Cir. 1997), *cert. denied*, 522 U.S. 1117 (1998). In *Corner Pocket*, plaintiffs alleged a conspiracy by a manufacturer and distributors of video lottery equipment to

allocate territories and fix prices. *Id.* The court accepted the defendants' proffered explanations for conduct that suggested an agreement to divide the market and fix prices over plaintiffs' evidence of conspiracy. *Id.* at 1110-14. It candidly acknowledged that it viewed *Matsushita* as requiring it to "weigh the summary judgment evidence of both parties in determining whether plaintiffs' evidence 'tends to exclude the possibility that the alleged conspirators acted independently.'" *Id.* at 1112. Further, reversing the ordinary summary judgment principle that inferences are drawn in favor of the nonmoving party, the court applied the opposite presumption, stating it could "not lightly disregard" "legitimate business reasons" the moving defendants gave for their business practices. *Id.* Going still further in preferring the defendants' evidence over the plaintiffs, the court discounted each item of evidence the plaintiffs offered as "too ambiguous" even when it reasonably supported an inference of conspiracy. *See id.* at 1112-14.

The Eighth Circuit has thus endorsed a summary judgment standard that entails weighing the plaintiff's evidence against the defendant's and giving the defendant the benefit of a presumption of lawfulness that can only be rebutted by evidence for which it is impossible even to *conceive* of an innocent explanation. *See id.*; *see also Lovett v. General Motors Corp.*, 998 F.2d 575, 579 (8th Cir. 1993).

The Sixth Circuit has likewise interpreted *Matsushita* to mean that the plaintiff in an antitrust case, to withstand summary judgment, "has the burden of showing that the evidence is *more* consistent with conspiracy than with independent action." *See Super Sulky, Inc. v. United States Trotting Ass'n*, 174 F.3d 733, 739 (6th Cir.), *cert. denied*, 145 L. Ed 2d 146 (1999) (emphasis added). The Sixth Circuit in that case rejected the plaintiff's circumstantial evidence because it "d[id] not exclude a non-conspiratorial explanation for the [group's] action." *Id.* In applying this standard, the court discussed *Matsushita*, but made no mention of *Kodak*. The Sixth Circuit standard, like the Fourth's and Eighth's, is

applied without regard to whether the plaintiff's theory is implausible or based on procompetitive conduct. It similarly substitutes judge for jury: the judge decides whose evidence is strongest (is the evidence "more consistent" with the plaintiff's theory of an antitrust violation or the defendant's theory of innocence?) and, if the judge decides the defendant's evidence is weightier, grants summary judgment.

The courts that, like the Fourth, Eighth and Sixth Circuit, have continued to read *Matsushita* as allowing, or indeed mandating, that courts determine not merely which inferences are permissible from the evidence, but which are stronger, represent a drastic departure from the ordinary summary judgment standard and a serious incursion on antitrust plaintiffs' seventh amendment right to a jury trial. They also ignore this Court's holding in *Kodak* that the high threshold established for the plaintiff in *Matsushita* was intended to apply only in cases in which the plaintiff's theory is implausible and would necessitate inferring conspiracy from procompetitive behavior.

CONCLUSION

This Court should grant certiorari and confirm that it meant what it said in *Kodak* and that the lower courts *must*—absent the extraordinary circumstances present in *Matsushita*—apply the ordinary summary judgment standard in antitrust cases.

DATED: January 18, 2000.

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IN THE

Supreme Court of the United States

GANGI BROS. PACKING COMPANY, 7-UP BOTTLING COMPANY OF PHILADELPHIA, INC., 7-UP BOTTLING COMPANY OF SAN FRANCISCO, SOUTHEASTERN SPECIALTY FOODS CORP., TRANS-PACKERS SERVICES CORP., and VARNI BROTHERS CORPORATION, dba SEVEN-UP BOTTLING OF MODESTO, on behalf of themselves and all others similarly situated,

Petitioners,

v.

CARGILL, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court Of Appeals For The Ninth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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DECISION OF THE NINTH CIRCUIT
DECIDED SEPTEMBER 1, 1999

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: CITRIC ACID LITIGATION

No. 98-15344

7-UP BOTTLING CO. OF JASPER INC., et al.,

Plaintiffs,

and

VARNI BROTHERS CORP., on its own behalf and all others similarly situated dba Seven-Up Bottling of Modesto; 7-UP BOTTLING COMPANY OF PHILADELPHIA, INC.

Plaintiffs-Appellants,

v.

ARCHER DANIELS MIDLAND CO., INC., a Delaware corporation, et al.,

Defendants,

and

CARGILL, INC.,

Defendant-Appellee.

Before: O'SCANNLAIN, McKEOWN, and WARDLAW, Circuit Judges.

O'SCANNLAIN, Circuit Judge:

We must decide whether purchasers were able to establish that a citric acid manufacturer conspired with competitors to fix prices and to allocate market share in violation of the federal antitrust laws.

I

Citric acid is a corn derivative with a wide variety of uses in the manufacture of food, soft drinks, detergents, and pharmaceuticals. Varni Brothers Corp. and 7-Up Bottling Company of Philadelphia, Inc. (collectively "Varni") filed civil antitrust class actions against Cargill, Incorporated ("Cargill"), Archer Daniels Midland ("ADM"), Haarman & Reimer ("H&R"), Hoffman LaRoche ("HLR"), and Jungbunzlauer ("JBL"), alleging that these firms conspired to fix citric acid prices and to allocate market share. These cases were consolidated and transferred to the Northern District of California. The district court certified a class consisting of all people and entities (other than government purchasers and the defendants themselves and affiliated companies) who had purchased citric acid directly from the defendants.

Conceding the existence of a conspiracy in the citric acid market but denying its participation therein, Cargill moved for summary judgment. ADM, H&R, HLR, and JBL (collectively the "admitted conspirators") each admitted to conspiring to fix citric acid prices and reached settlements with Varni. Thus, the only question before the district court was whether Cargill was a member of this conspiracy or, more precisely, whether Varni had produced sufficient evidence such that a reasonable factfinder could so infer. The district court concluded that Varni failed to satisfy this test because its evidence did not "tend[ ] to exclude the possibility that [Cargill] acted independently." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588,

106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (internal quotation marks and citation omitted). Accordingly, the court granted summary judgment in favor of Cargill and commented that "[a]pparently hoping that quantity will substitute for quality, plaintiffs have submitted voluminous but weak circumstantial evidence that they argue indicates that Cargill was a member of the conspiracy."

On appeal, Varni argues that Cargill's participation in the conspiracy can be reasonably inferred from the circumstantial evidence in the record. Varni also appeals the district court's denial of a discovery motion, an issue we consider in Part IV.

II

To avoid extensive repetition of the facts, we will first consider the legal standard by which we decide whether Varni has produced sufficient evidence to survive summary judgment. By understanding the proper legal framework applicable at the summary judgment stage, we can better analyze the evidence.

A

Price fixing is illegal *per se* under section 1 of the Sherman Act. *See* 15 U.S.C. § 1; *United States v. Socony–Vacuum Oil Co.*, 310 U.S. 150, 223, 60 S.Ct. 811, 84 L.Ed. 1129 (1940). "On a claim of concerted price fixing, the antitrust plaintiff must present evidence sufficient to carry its burden of proving that there was such an agreement." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 763, 104 S.Ct. 1464, 79 L.Ed. 2d 775 (1984). Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed. 2d 265 (1986) ("Rule 56(c) mandates the entry of

summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.").

Varni can establish a genuine issue of material fact by producing either direct evidence that Cargill conspired to fix citric acid prices or circumstantial evidence from which a reasonable factfinder could conclude that Cargill so conspired. Although Varni argues halfheartedly that it has produced direct evidence that Cargill entered into illegal price-fixing agreements with the admitted conspirators—in which case summary judgment would, of course, be inappropriate, *see McLaughlin v. Liu*, 849 F.2d 1205, 1208 (9th Cir.1988); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 631-32 (9th Cir.1987)—Varni concedes that such evidence is, at best, weak. Having reviewed the proffered evidence, we can find nothing in the record that establishes, without requiring any inferences, that Cargill participated in the citric acid price-fixing conspiracy. *See In re Baby Food Antitrust Litig.*, 166 F.3d 112, 118 (3d Cir.1999) ("*Baby Food*") ("Direct evidence in a Section 1 conspiracy must be evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted."). We thus agree with both parties that the essential question in this case is whether Varni's circumstantial evidence is sufficient to permit a reasonable factfinder to conclude that Cargill was a participant in the citric acid conspiracy.[1]

Matsushita is the Supreme Court's foremost explanation of how summary judgment works in the antitrust

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[1]In its briefs, Varni argued that it need show only a "slight connection" between Cargill and the conspiracy to survive summary judgment. *See, e.g., United States v. Dunn*, 564 F.2d 348, 357 (9th Cir. 1977). At oral argument, however, Varni expressly disclaimed any reliance upon this theory.

context. *See Matsushita*, 475 U.S. at 585-97, 106 S.Ct. 1348. The *Matsushita* Court began by reaffirming hornbook law that courts are obligated to construe the evidence in the light most favorable to the non-moving party, to give the non-moving party the benefit of all reasonable inferences, and to refrain from making credibility determinations. *See id.* The Court cautioned, however, that, although plaintiffs are to be given the benefit of the doubt, they "must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* at 588, 106 S.Ct. 1348. Importantly, "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* at 586, 106 S.Ct. 1348. Instead, an inference of conspiracy is sustainable only if "reasonable in light of the competing inferences of independent action," and "[t]o survive a motion for summary judgment . . . , a plaintiff seeking damages for a violation of § 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Id.*, at 588, 106 S.Ct. 1348 (quoting *Monsanto*, 465 U.S. at 764, 104 S.Ct. 1464); *accord City of Long Beach v. Standard Oil Co. of California*, 872 F.2d 1401, 1404 (9th Cir.1989). The Court warned that permitting the inference of conspiratorial behavior from evidence consistent with both lawful and unlawful conduct would deter pro-competitive conduct—an especially pernicious danger in light of the fact that the very purpose of the antitrust laws is to promote competition. *See id.* at 593, 106 S.Ct. 1348 ("[C]ourts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct.").

Based on *Matsushita*, this circuit has outlined a two-part test to be applied whenever a plaintiff rests its case entirely on circumstantial evidence. First, the defendant can "rebut an allegation of conspiracy by showing a plausible and justifiable reason for its conduct that is consistent with

proper business practice." *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 902 (9th Cir.1987); *accord City of Long Beach*, 872 F.2d at 1406; *Wilcox v. First Interstate Bank of Oregon*, 815 F.2d 522, 526-28 (9th Cir.1987); *T.W. Elec. Serv.*, 809 F.2d at 632, 635. The burden then shifts back to the plaintiff to provide specific evidence tending to show that the defendant was not engaging in permissible competitive behavior. *See Long Beach*, 872 F.2d at 1406; *Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1159 (9th Cir.1988); *Wilcox*, 815 F.2d at 525; *Richards*, 810 F.2d at 902, 904; *T.W. Elec. Serv.*, 809 F.2d at 632.[2]

B

We have repeatedly applied this summary judgment framework, which, to repeat, we must apply whenever the plaintiff cannot establish every element of its case without asking the court to draw an inference in his favor. In *Richards*, a local trucking carrier, Foothills Express, accused major trucking companies of engaging in a concerted group boycott against Foothills Express. The defendant corporations used Foothills Express as an interliner for shipments to the Sacramento area: the defendants carried freight from areas nationwide to Sacramento using their own trucks and Foothills Express made the deliveries from Sacramento to surrounding areas. Foothills Express,

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[2]This second requirement flows directly from *Matsushita*. As then-Judge Kennedy explained in *Richards*:

> Were the case to go to trial, [the antitrust plaintiff] would bear the burden of proving the existence of the alleged conspiracy .... To discharge its burden, it would have to introduce evidence that would permit a jury to conclude that a conspiracy ... [is] more likely than not. If the evidence produced in opposition to a defendant's motion for summary judgment does not give reasonable support to a finding of conspiratorial, as opposed to unilateral, behavior, summary judgment is appropriate.

Richards, 810 F.2d at 903 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106, S.Ct, 2505, 91 L.Ed. 2d 202 (1986); 6 P. Areeda, *Antitrust Law* ¶1405, at 21 (1986)).

however, began soliciting the business of defendants' customers using information gained from carrier freight bills, a practice known as "back solicitation." In response to Foothill Express's back solicitation, each of the defendants cut off or substantially reduced its business with Foothills. *See Richards*, 810 F.2d at 900-01.

Foothills Express alleged that the defendants had violated the antitrust laws by *agreeing* not to employ the services of any local carrier who engaged in back solicitation. In support of its claims, Foothills Express cited the fact that each defendant stopped using its services around the same time. The defendants, however, responded that it was in each defendant's *independent self-interest* to refrain from doing business with local carriers who competed with them. Considering the defendants' explanation, we held that the defendants had "met their burden of proffering a plausible justification for their conduct consistent with proper business practice." *Id.* at 902. Thus, the burden shifted to Foothills to demonstrate that the trucking companies acted pursuant to some sort of *conspiracy*, since the legality of their conduct depended crucially, as is often the case, on whether they had acted independently or pursuant to an agreement.

Foothills Express asserted that the existence of a conspiracy could be inferred from the concession by one of the defendant corporations' presidents that there was "a gentlemen's agreement" with the other major trucking companies against back solicitation. *Richards*, 810 F.2d at 903. We acknowledged that it was possible to interpret this deposition testimony as evidence of an agreement amongst competitors, but noted that this evidence was not necessarily inconsistent with lawful behavior. The evidence could also plausibly be interpreted either as a "refer[ence] to industrywide acceptance of the competitive reality that back solicitation was an abuse of the interlining relation" or as "mean[ing] there were discrete, bilateral understandings between each defendant on one hand, and its interlining

company on the other" (rather than a horizontal agreement amongst the defendants). *Id.* Under both of these latter interpretations, defendants would have engaged only in lawful conduct. Because the circumstantial evidence was as consistent with permissible competitive behavior as with illegal conspiracy—and thus did not tend to exclude the possibility of legitimate behavior—we concluded that the supposed smoking gun was not sufficient for Foothills to overcome defendants' summary judgment motion. *See id.* at 903-04.

We reached a similar conclusion in *T.W. Electrical Service*, in which electrical contractors accused the Pacific Electrical Contractors Association ("PECA") of conspiring with unions to require all contractors to make certain contributions. Because PECA offered a legitimate, non-conspiratorial interpretation of its conduct, we emphasized that, to withstand PECA's summary judgment motion, "the contractors must not only come forward with 'specific facts' showing the existence of a genuine issue of material fact, but also must set forth 'specific facts' that tend to *exclude* the possibility that PECA acted independently." *T.W. Elec. Serv.*, 809 F.2d at 635. In light of the fact that the contractors failed to produce evidence showing that the contribution requirement was the product of an agreement between PECA and others, rather than a requirement unilaterally imposed by PECA, we affirm the grant of summary judgment in favor of PECA. *See id.*

In *Wilcox*, commercial borrowers of the First Interstate Bank of Oregon ("FIOR") sued FIOR alleging that it had conspired with other banks to fix interest rates. After the borrowers successfully convinced a jury to infer conspiracy from evidence of price parallelism, exchanges of pricing information, and opportunities to conspire, the district court granted judgment not withstanding the verdict in favor of FIOR. Agreeing that there was no direct evidence of any agreement to set interest rates, that the circumstantial evidence of price fixing did not tend to exclude the

possibility that FIOR set rates independently, and that FIOR did not act against its own independent self-interest, we affirmed. *See Wilcox*, 815 F.2d at 524-28.

In another case, the City of Long Beach, which sold oil to various major oil companies at a price based on posted prices for Wilmington crude oil, alleged that the oil companies conspired to maintain uniformly low, noncompetitive posted prices. Although it lacked direct evidence of conspiracy, the City produced evidence that the defendants exchanged crude oil amongst themselves using a complicated "three-cut exchange system" rather than simply valuing oil based upon the posted prices. The City asserted that the companies used the three-cut exchange system because the posted prices were rigged: the oil corporations were making an "unusual effort" to maintain the elaborate three-cut exchange system, and the defendants did not demonstrate any advantage of this "cumbersome and inconvenient" system over valuing oil using posted prices. *Long Beach*, 872 F.2d at 1403, 1406. Applying the legal framework outlined above, we concluded that evidence of such behavior, inexplicable absent a conspiracy, *did* tend to exclude the possibility that defendants acted independently and thus reversed the grant of summary judgment in the defendants' favor. *See id.* at 1406-07.

C

Notwithstanding our many cases applying this legal framework for analyzing circumstantial evidence cases, Varni asks us to apply a very different summary judgment standard whereby it need *not* produce evidence tending to exclude the possibility that defendants acted independently even though it relies entirely on circumstantial evidence. Varni cites only a single case, *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 906 F.2d 432 (9th Cir.1990), in support of its proposed legal standard. The plaintiffs in that case, however, presented *direct* evidence of conspiracy, *see id.* at 456-57, 459-60 & n.

22, thus making dicta any discussion therein of the standard applicable when plaintiffs rely exclusively on circumstantial evidence. *See United States Natl. Bank of Oregon v. Independent Ins. Agents of Am. Inc.*, 508 U.S. 439, 463 n.11, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993) (recognizing the "need to distinguish an opinion's holding from its dicta"); *Delta & Pine Land Co. v. Sinkers Corp.*, 177 F.3d 1343, 1349-50 (Fed. Cir.1999) (declining to follow dicta).

The requirement that a plaintiff who relies solely on circumstantial evidence of conspiracy—as Varni does—must produce evidence tending to exclude the possibility that defendants acted independently follows directly from the Supreme Court's opinion in *Matsushita* and is, as we have explained, well-established in both this circuit, *see Long Beach*, 872 F.2d at 1406; *Jeanery*, 849 F.2d at 1159; *Wilcox*, 815 F.2d at 525; *Richards*, 810 F.2d at 902, 904; *T.W. Elec. Serv.*, 809 F.2d at 632, as well as in our sister circuits. *See Mitchael v. Intracorp*, 179 F.3d 847, 858 (10th Cir.1999); *Baby Food*, 166 F.3d at 123; *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 569-70 (11th Cir.1998), *petition for cert. filed*, 67 U.S.L.W. 3773 (U.S. June 9, 1999) (No. 98-1997); *Corner Pocket of Sioux Falls, Inc. v. Video Lottery Techs., Inc.*, 123 F.3d 1107, 1112 (8th Cir.1997), *cert. denied*, — U.S. —, 118 S.Ct. 1054, 140 L.Ed.2d 116 (1998); *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 55 (2d Cir.1997); *Thompson Everett, Inc. v. National Cable Adver., L.P.*, 57 F.3d 1317, 1323 (4th Cir.1995); *Wallace v. Bank of Bartlett*, 55 F.3d 1166, 1170 6th Cir. 1995); *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 49 (7th Cir.1992); *In re Beef Indus. Antitrust Litig.*, 907 F.2d 510, 514 (5th Cir.1990).

With the appropriate legal standard in mind, we now, analyze the evidence in the record.

III

Varni offers a plethora of evidence which it claims shows that Cargill was a member of the citric acid

conspiracy. As Varni emphasizes, the crucial question is whether all the evidence considered as a whole can reasonably support the inference that Cargill conspired with the admitted conspirators to fix prices. *See Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962). Thus, we consider the evidence offered by Varni, and then ask whether, in light of all the evidence considered together, a reasonable factfinder could have concluded that Cargill conspired to fix prices.

A

Varni contends that the admitted conspirators and Cargill used the industry's trade association, the European Citric Acid Manufacturers Association ("ECAMA"), as a vehicle for conducting illegal conspiratorial activities. The claim, in a nutshell, is that ECAMA functioned as a front organization for conspiratorial activities.

ECAMA held semi-annual meetings that were attended, on a regular basis, by "masters" (the term used by the conspirators to describe high-level executives involved in the conspiracy who negotiated the broad terms of the conspiracy) and "sherpas" (lower-level corporate executives responsible for implementing the details of the conspiracy), among others. Varni argues that these meetings provided an opportunity for competitors to reach illegal agreements and that it is unlikely that these meetings were legitimate in light of the fact that many of those attending ECAMA meetings were active players in the conspiracy.

Having reviewed the record independently, however, we agree with the district court that there is no evidence to support Varni's theory that these meetings were used to pursue illegal ends. Although the evidence makes clear that representatives of the admitted conspirators gathered in "unofficial" meetings to fix prices and to allocate market shares—often in the same city as, and within a few days of, officially scheduled ECAMA meetings—there is no evidence that illegal activities took place during ECAMA

meetings attended by Cargill representatives. Nor is there evidence that Cargill participated in any of the "unofficial" meetings. Instead, the apparently uncontroverted testimony of Hans Hartmann, president of H&R and a master in the conspiracy, was to the contrary: that official ECAMA meetings were legitimate and that the illegal activities took place in separate, non-ECAMA meetings. According to Hartmann, the ECAMA gatherings merely provided a convenient excuse for the conspirators to be in the city at the same time.

Lacking evidence that the admitted conspirators and Cargill negotiated or reached price-fixing agreements during ECAMA meetings, Varni alleges that the citric acid manufacturers used ECAMA as a mechanism for negotiating illegal agreements with Chinese citric acid producers, whose expanding market share had caused increasing concern among ECAMA members. Varni cites the following evidence: (1) that ECAMA gathered information about Chinese citric acid producers; (2) that ECAMA commissioned a study of "the Chinese situation as to location, production, distribution, prices"; (3) the ECAMA held a meeting to discuss a report on Chinese citric acid producers; (4) that an executive of Gadot Petrochemical Industries, Ltd. ("Gadot") circulated a memorandum advising ECAMA to correspond with Chinese citric acid producers to "stabilize and regulate Chinese production and exports"; and (5) that handwritten notes of an ADM employee at a March 1994 ECAMA working group meeting contained the following statement—"Undertaking is a confidential agreement to maintain price. Producers must police."[3]

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[3]Varni also attempts to rely on a search warrant affidavit by FBI Agent Brian Shepard, which reports what a witness had told the FBI agent that a master had told the witness. The district court did not abuse its discretion in deciding not to consider this evidence because it was hearsay. *See Quevedo v. Trans-Pacific Shipping, Inc.*, 143 F.3d 1255, 1258 (9th Cir.1998).

We have little trouble concluding that the first three pieces of evidence do not tend to exclude the possibility of legitimate behavior. Gathering information about pricing and competition in the industry is standard fare for trade associations. If we allowed conspiracy to be inferred from such activities alone, we would have to allow an inference of conspiracy whenever a trade association took almost any action. As the Supreme Court has recognized, however, trade associations often serve legitimate functions, such as providing information to industry members, conducting research to further the goals of the industry, and promoting demand for products and services. *See, e.g., Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 567, 45 S.Ct. 578, 69 L.Ed. 1093 (1925).

At first glance, the last two pieces of evidence appear more ominous. The Gadot memorandum suggests an illegal course of conduct—that ECAMA contact the Chinese producers and agree to stabilize prices. However, minutes of an ECAMA meeting indicate that the suggestion "was quickly overviewed and it was decided not to pay attention to that message for most of the information contained in it [was] against the spirit of the anti-trust law." It would not be reasonable to infer that Cargill engaged in illegal activities merely from evidence that an illegal course of action was suggested but immediately rejected.[4] Finally, the handwritten notes that constitute the fifth piece of evidence were taken at a meeting at which Cargill was not present. Thus, even if we interpret the notes as Varni asks us to, it would nevertheless not be reasonable to infer from such notes that *Cargill* conspired to fix prices.

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[4]Importantly, we note that Varni's theory of the case is that Cargill conspired with the admitted conspirators to fix prices and to allocate market shares amongst themselves. Varni has not articulated a conspiracy theory wherein Cargill or the admitted conspirators actually conspired with Chinese producers to fix prices or to allocate market shares.

B

Varni argues that, even if ECAMA was not directly used as a mechanism for fixing prices, it served as a front organization for the illegal distribution of detailed, firm-specific information on citric acid production and sales, information which facilitated the policing of agreed-upon market share allocations.

ECAMA collected figures on production and sales from each of its members, audited this information on an annual basis, and produced statistics aggregated by country on citric acid production and sales. ECAMA members reported production and sales information to an independent agent of ECAMA, who distributed information aggregated by country to members. The reason that only aggregate statistics were distributed was to preserve the confidentiality of individual members' sales and production figures. It is uncontested that these activities served the legitimate purpose of informing members of worldwide citric acid conditions and were, in themselves, wholly legal. Cargill vigorously maintains that ECAMA distributed only *aggregate* information.

Varni contends, however, that ECAMA engaged in the additional illegal step of distributing *firm-specific* data to each member firm so that they could verify that all conspirators were adhering to agreed-upon market shares. The only evidence produced by Varni in support of its allegation that members received firm-specific information is a table with detailed, firm-specific market share information found in Cargill's business records. Although Varni asserts that this information could have come only from ECAMA, Cargill maintains that these figures were generated from its own internal market research, and Varni has offered no evidence to the contrary. Moreover, the only other evidence in the record relating to this issue is Hartmann's testimony that the admitted conspirators policed their conspiracy by exchanging sales and production figures on a monthly basis

by telephone, which clearly supports Cargill's position.

Lacking solid evidence that ECAMA ever disclosed firm-specific information to members, Varni falls back upon its argument that such an inference is reasonable in light of the fact that ECAMA hired auditors to verify the information submitted by members. According to Varni, the only conceivable reason ECAMA would have had to hire an independent firm to audit production and sales data is to allow conspirators to police their price-fixing conspiracy.

Cargill, however, offers a legitimate explanation—that the auditing process served the perfectly legal purpose of guaranteeing the reliability of the aggregate statistics on worldwide market conditions that ECAMA distributed to members. Cargill joined ECAMA to get "a more accurate picture of world supply/demand conditions." Cargill, like the other firms, valued having *accurate* information on market conditions throughout the world, because such information was being used to make strategic business decisions. If any ECAMA member submitted inaccurate data (whether intentionally or not), the resulting aggregate statistics would be inaccurate. Decisions made on the basis of inaccurate data are, of course, likely to be sub-optimal. If firms had to worry about whether their competitors were submitting accurate information, they would likely have been less willing to rely on the information distributed by ECAMA in making strategic business decisions. Auditing eliminated this worry.

Applying the legal framework outlined in Part II we conclude that (1) Cargill's participation in an organization that collected and audited members' production and sales figures to calculate and distribute aggregate market statistics is as consistent with legitimate behavior as with conspiratorial behavior, and (2) Varni has failed to produce evidence tending to exclude the possibility that Cargill acted independently.

C

Lacking evidence that ECAMA itself served legal ends, Varni falls back upon the argument that Cargill's decision to join ECAMA in the first place constitutes indirect evidence that Cargill was a participant in the citric acid conspiracy. Its theory is the same here as with much of the other evidence—that Cargill's behavior was inconsistent with its own self-interest and that, since no non-conspiring rational actor would have decided to do what Cargill did, Cargill must have been conspiring.

Cargill asserts that it joined ECAMA to obtain accurate information on worldwide market conditions in the citric acid industry, which it valued because it was considering expanding into foreign markets. In joining, Cargill believed that information on worldwide supply and demand in the citric acid industry would assist it in deciding which markets to enter, when to enter them, and how best to do so.

Varni, however, maintains that the costs of joining ECAMA far outweighed any benefits, such that Cargill must have received some other (*i.e.*, conspiracy-related) benefit from joining. The costs relate to Cargill's obligation, as an ECAMA member, to disclose sales and production information to an independent agent of ECAMA who would calculate the aggregate statistics distributed to members. Cargill itself concedes that it considered the danger that its production and sales figures would fall into the hands of competitors to be a drawback of joining ECAMA. Varni argues that, on the benefits side, Cargill gained little from joining ECAMA because ECAMA's focus was on the European citric acid market and Cargill did not compete in that market.

In response, Cargill points to the uncontroverted evidence in the record that it *did* explicitly weigh the costs and benefits of joining ECAMA and did take steps to assure that its data would be kept as confidential as possible. When

ECAMA and Cargill representatives met in February 1993 to negotiate and discuss terms of membership, Robert Simpson, a Cargill executive, conveyed Cargill's concerns about joining ECAMA. Simpson stated that he recognized that, as an ECAMA member, Cargill would have to disclose production and sales information to ECAMA so that ECAMA could compute aggregate statistics, but wanted to be absolutely sure that Cargill-specific figures would not fall into the hands of competitors. In a letter of March 12, 1999, ECAMA's Secretary responded, explaining that Cargill's data would be kept confidential and that only aggregate market data would be provided to other firms. The Secretary did, however, acknowledge that when Cargill joined ECAMA, ECAMA members would be able to derive a one-time estimate of Cargill's sales and productions figures by comparing the pre-Cargill figures with the new figures after Cargill's joinder, with the difference roughly equaling Cargill's sales and production figures.

Simpson evaluated the costs and benefits of joining ECAMA in an internal memorandum. By joining ECAMA, Cargill would get a better picture of world supply and demand conditions, which would be of increasing importance as Cargill expanded worldwide. In addition, Cargill stood to benefit from ECAMA's work on product development and other industry-related matters. Simpson noted that "[t]he only drawback to ECAMA membership [was] disclosure of Cargill's sales volume and production capacity," but concluded that this drawback was minimal because, "[a]fter several detailed discussions with ECAMA, I feel comfortable with the confidentiality of Cargill trade data and ECAMA's position on national competition laws (antitrust)." Weighing the costs against the benefits, Simpson recommended that Cargill join ECAMA, and Cargill subsequently did so in May 1993.

To the extent that Cargill's decision is consistent with conspiratorial behavior, the evidence is equally well, if not better, interpreted as a decision in Cargill's own independent

self-interest. Cargill offered a sound reason for joining ECAMA, and, importantly, Varni's evidence does not tend to exclude the possibility that Cargill, acting independently, reasonably concluded that the benefits of membership outweighed the costs. Varni's theory might be validated if information on worldwide market conditions were truly useless to Cargill, but this information was valuable because Cargill was considering expanding abroad. Finally, we note that Varni's argument that information on worldwide market conditions was worthless to Cargill is inconsistent with its attacks on Cargill for not expanding operations rapidly enough outside of the United States. *See infra* Part III.D.

D

Varni argues that Cargill's failure to expand its production capacity more rapidly than it did constitutes circumstantial evidence that it was conspiring to fix prices. When it entered the citric acid market, Cargill's production facility had an annual production capacity of 56 million pounds. In 1992, Cargill expanded capacity to 80 million pounds. In March 1992, Cargill issued a press release announcing that it would double capacity to 160 million pounds per year. Sometime in or before October 1992, however, Cargill decided to increase capacity from 80 million to only 120 million pounds.[5] Varni contends that Cargill's decision to expand capacity by 50 percent rather than by 100 percent is circumstantial evidence that Cargill was conspiring to fix prices and allocate market share.

The timing of this decision, however does not fit with Varni's theory of the conspiracy. Varni contends that Cargill was a vigorous competitor until it turned conspirator in 1993, but the decision to expand capacity to 120 million rather than

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[5]This expansion was completed by 1994. Cargill also implemented improvements such as installing a liquid extraction recovery process, which increased the efficiency of the manufacturing process.

160 million pounds was made by late 1992. Because "the factual context renders [appellants'] claim implausible," no reasonable factfinder could conclude from this evidence that Cargill was part of the conspiracy. *Matsushita*, 475 U.S. at 587, 106 S.Ct. 1348.

Moreover, Cargill *did* expand rapidly. It increased its annual production capacity from 56 million to 80 million and then to 120 million—in only a matter of years. Faulting a company for expanding too slowly where it doubled capacity in a few years would subject countless strategic business decisions to second-guessing by courts. Courts have recognized that firms must have broad discretion to make decisions based on their judgments of what is best for them and that business judgment should not be second-guessed even where the evidence concerning the rationality or the challenged activities might be subject to reasonable dispute. *See Reserve Supply*, 971 F.2d at 49-53; *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 662 (7th Cir.1987).[6] Cargill has explained why it did not expand even more rapidly: it was concerned that an excessively rapid expansion in citric acid supply would undermine prices and wanted to avoid precipitating a costly price war as it had done when it first entered the citric acid market (incurring substantial losses as a result).

E

Varni contends that Cargill "decided" to stop increasing its market share in 1993, which only a conspirator would have done. We note, as an initial matter, that it is not reasonable to infer that a firm is engaging in illegal activities merely from the fact that it failed to continue to increase market share. If a conspiracy could be inferred so easily, then no firm against whom an antitrust claim is levied would

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[6]For the same reason, we reject Varni's assertion that illegal conduct can be inferred from Cargill's failure to expand more rapidly in Europe.

ever be entitled to summary judgment unless it continually increased its market share. In light of the fact that firms enjoy discretion in exercising business judgment, *see supra* Part III.D, such a rule of law was untenable.

In any case, there is no evidence in the record supporting Varni's claim that Cargill's market share flattened after 1993. Varni attempts to rely on market share statistics contained in an internal Cargill document cited in the report of its economic expert. *See infra* n. 9. That document, however, was not included as part of the summary judgment record. To be considered in a motion for summary judgment, "documents must be authenticated by and attached to an affidavit that meets the requirements of [Federal Rule of Civil Procedure] 56(e) and the affiant must be a person through whom the exhibits could be admitted into evidence." *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1550-51 (9th Cir.1989) (internal quotation marks omitted). The document on which Varni relies for its market share figures was not submitted as part of the summary judgment record, and thus we do consider it.

Varni attempts to get this document in through the back door. First, it argues that this data is admissible because it is discussed in an expert report which *was* part of the record. The law is clear, however, that an expert report cannot be used to prove the existence of facts set forth therein. *See Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1261-62 (9th Cir.1984); *see also Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242, 113 S.Ct. 2578, 125 L.Ed.2d 168 (1993) ("Expert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them,); *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1436 (9th Cir.1995) (same). Varni makes the alternative argument that the expert report can be used to show the truth of facts stated therein because it is a summary of the data admissible under Federal Rule of Evidence 1006. Varni, however, has failed to show that the underlying document that it neglected to attach as evidence to its

opposition motion qualifies as a voluminous writing that cannot be conveniently examined. *See* Fed.R.Evid. 1006 ("The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation.").

Because there is no evidence in the record establishing that Cargill's market share was constant between 1993 and 1995,[7] any inference founded upon that factual assertion—even one drawn by an economic expert—is necessarily unreasonable. *See Brooke Group*, 509 U.S. at 242, 113 S.Ct. 2578 ("When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict.").

F

Varni argues that the fact that Cargill's list prices mirrored those of its competitors is evidence of conspiracy. A section 1 violation cannot, however, be inferred from parallel pricing alone, *see Wallace*, 55 F.3d at 1168; *Wilcox*, 815 F.2d at 526; *Reserve Supply*, 971 F.2d at 50, nor from an industry's follow-the-leader pricing strategy, *see United States v. International Harvester Co.*, 274 U.S. 693, 708-09, 47 S.Ct. 748, 71 L.Ed. 1302 (1927); *Wilcox*, 815 F.2d at 526. Parallel pricing is a relevant factor to be considered along with the evidence as a whole; if there are sufficient other "plus" factors, an inference of conspiracy can be reasonable. *See Petroleum Prods.*, 906 F.2d at 441-60.

It is true that Cargill's list prices have generally been nearly identical to those of ADM and H&R. Between 1990 and 1997, ADM, H&R, and Cargill always changed list prices within a month of one another and generally did so in

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[7]In fact, the only market share data actually in the record—and thus the only data properly before this court—indicates that Cargill's market share continued to increase even after 1993.

the same month. We must, however, consider the evidence in the record as a whole. *See Continental Ore*, 370 U.S. at 699, 82 S.Ct. 1404. Although there appears to have been little competition in citric acid *list* prices, Cargill did price aggressively in actual contracts. An internal Cargill document stated its strategy of generally "[s]upport[ing] industry price increases" but "[s]electively compet[ing] at strategic accounts." As part of this strategy, Cargill reached agreements to supply most of the citric acid needs of Coca-Cola, Pepsi, Kraft General Foods, Procter & Gamble Beverage, and Quaker Oats, and these five accounts constituted the majority of Cargill's sales.

Also relevant is Cargill's success in gaining 22 percent of the United States market share by 1995, which came largely at the expense of ADM and H&R. A May 1993 H&R internal monthly report expressed exasperation with Cargill's success, reporting as follows: "We as a company can no longer take a position of 'maintaining our share of the business'. [sic] Why? Because we are losing! Cargill has new capacity coming on stream and they will continue to go after anyone they can get. Each time we play it conservative in our negotiations and price offerings Cargill beats us by half to one cent. Most of the time its [sic] a price issue." A second H&R internal report from 1994 on the domestic citric acid market concluded that Cargill had gained market share from ADM and H&R by consistently underpricing them. A third H&R document, dated 1995, similarly reported that "Cargill has been quite aggressive with citric price offers."

Considering the foregoing evidence together, we conclude that the evidence does not tend to exclude the possibility that Cargill acted legally in its pricing decisions.

G

Varni asks the court to infer Cargill's role in the conspiracy from the fact that representatives of Cargill attended meetings and had telephone conversation with individuals who have been identified as masters and sherpas.

Varni does not offer any specific details with regard to illegal discussions, but instead merely asks us to infer participation in the conspiracy from the opportunity to do so. Such meetings, at least in and of themselves, do not tend to exclude the possibility of legitimate activity. *See Baby Food*, 166 F.3d at 126 ("[C]ommunications between competitors do not permit an inference of an agreement to fix prices unless 'those communications rise to the level of an agreement, tacit or otherwise.'") (quoting *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1013 (3d Cir.1994)).

H

Varni argues that the fact that Cargill's files contained copies of competitors' price lists is circumstantial evidence that Cargill was conspiring with competitors to fix prices. Varni relies upon *United States v. Container Corp. of America*, 393 U.S. 333, 89 S.Ct. 510, 21 L.Ed.2d 526 (1969), in which the Supreme Court held that the reciprocal exchange of price information pursuant to an agreement by the defendants was concerted action sufficient to establish a price-fixing conspiracy. There is, however, a crucial difference between that case and the case before us. Unlike the plaintiffs in *Container* who presented evidence of an agreement to exchange pricing information, *see Container*, 393 U.S. at 340, 89 S.Ct. 510; *accord Baby Food*, 166 F.3d at 125-26, Varni has made no showing—or even any claim—that there was an agreement to exchange pricing information.

Although the possession of competitor price lists is consistent with conspiracy, it does not, at least in itself, tend to exclude legitimate competitive behavior. *See Baby Food*, 166 F.3d at 125; *Wallace*, 55 F.3d at 1169; *Stephen Jay Photography, Ltd. v. Olan Mills, Inc.*, 903 F.2d 988, 996 (4th Cir.1990). There are many legal ways in which Cargill could have obtained pricing information on competitors. *See United States v. United States Gypsum Co.*, 438 U.S. 422,

441 n. 16, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978); *Petroleum Prods.*, 906 F.2d at 455 ("To allow an inference of agreement from such evidence, standing alone, would have the effect of deterring competitors from obtaining information about other companies' actual retail prices, even through legitimate means. We can think of few inferences that would have a more undesirable distorting effect on market conduct."). Varni has not, for example, produced evidence tending to exclude the possibility that Cargill received these price lists legitimately from customers after they were distributed by competitors as Cargill claims.

I

Varni contends that a 1994 H&R document recommending that H&R "gain share at accounts where no significant effect on ADM, Cargill, JBL share" is circumstantial evidence of Cargill's role in the conspiracy because H&R would have been concerned about taking market share from Cargill only if they were conspiring with one another. Cargill responds with an innocent explanation—that H&R avoided competing directly with Cargill because H&R had consistently lost when it tried to do so due to Cargill's lower prices, and that H&R apparently found it easier simply to compete with other firms instead.[8]

In a similar case, plaintiffs produced what they characterized as direct evidence of a horizontal conspiracy. Upon close analysis, however, this court concluded that such evidence could be interpreted as evidence of a horizontal conspiracy but also could be construed in a benign light. We held that, in such a situation, the purported "smoking gun" was not sufficient in itself to preclude summary judgment because evidence as consistent with legitimate behavior as

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[8]This document is not direct evidence of conspiracy because there remains a gap between the document and the conclusion that Cargill was a conspirator, a gap that can be bridged only by making some sort of inference. *See Baby Food*, 166 F.3d at 120-21.

illegal behavior cannot independently support an inference of conspiracy. *See Richards*, 810 F.2d at 90304.

The Third Circuit recently reached a similar conclusion when it was confronted with purported smoking gun evidence in an antitrust price-fixing case involving the baby food industry. In *Baby Food*, an internal Heinz memorandum contained the following statement:

> I was told by [a prospective Heinz customer] that they wanted to stock only two brands of baby food—Gerber and someone else. Their main objective was to stock the lines that were preferred by the retailers. I advised them that we would make every effort to secure a majority base of distribution. However, with our "truce" in effect, our hands were tied.

Baby Food, 166 F.3d at 120. The *Baby Food* plaintiffs contended that the "truce" was evidence of a price-fixing conspiracy namely, that Heinz's hands were "tied" because they had *agreed* not to lower prices. The Third Circuit rejected this argument and concluded instead that "the single use of the term ['truce'] in a highly competitive business environment and in the face of continuing fierce competition is as consistent with independent behavior as it is with price-fixing." *Id.* at 127.

Considering Varni's interpretation of this evidence in light of Cargill's explanation, we conclude that the district court did not err in ruling that this evidence did not tend to exclude the possibility that Cargill was acting lawfully.

J

Varni also cites scattered evidence from 1991 and 1992 which purportedly supports an inference that Cargill was a conspirator. In its briefs, however, Varni conceded that "[u]ntil mid-1993, Cargill competed with the Admitted Conspirators." At oral argument, Varni argued that Cargill joined the conspiracy in October 1992—when Cargill indicated its receptiveness to joining ECAMA—rather than in May 1993—when Cargill actually joined ECAMA. Even

under this revised theory, all circumstantial evidence pre-dating October 1992 is irrelevant because it does not comport with Varni's theory that Cargill joined the conspiracy in October 1992.

K

Varni points to the trial testimony of ADM employee Barrie Cox in a criminal proceeding involving a price-fixing conspiracy in the lysine industry, in which Cox stated that he had discussions regarding the "bidding price for certain [citric acid] accounts" with someone from Cargill, and maintains that Cox's testimony constitutes direct evidence of price-fixing by Cargill. Cox's testimony at the lysine trial does not constitute direct evidence, however, because it still requires an inference that the price discussions were conspiratorial in nature. Furthermore, Cox's trial testimony, not subjected to cross-examination, does not possess the requisite specificity to withstand summary judgment. See *Baby Food*, 166 F.3d at 125 ("Evidence of sporadic exchanges of shop talk among field representatives who lack pricing authority is insufficient to survive summary judgment.") (citing *Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348, 1357 (9th Cir.1982)).

Subsequent to oral argument in this case, Varni filed a request for judicial notice of and motion to supplement the record with the government's sentencing memorandum in the lysine conspiracy case. Varni relies in particular on an FBI investigative report attached to the sentencing memorandum, which summarizes statements allegedly made by ADM employee Cox in an FBI interview. According to the report, Cox claimed that he had discussions with Cargill employee William Gruber regarding the bidding price for specific citric acid accounts. Varni argues that Cox's statements, as described in the FBI report, constitute specific, direct evidence of price-fixing by Cargill in the citric acid industry.

Cargill has vigorously opposed Varni's request for

judicial notice, offering several arguments as to why the substance of Cox's FBI interview statements is not a proper subject for judicial notice. Cargill makes the following arguments: (1) Cox's statements in the FBI report are inadmissible "triple hearsay"; (2) the statements are inadmissible under Federal Rule of Evidence 403 because they lack probative value; (3) as a general rule, the summary judgment record cannot be supplemented on appeal and is limited to material before the district court; and (4) under Federal Rule of Evidence 201, only facts "not subject to reasonable dispute" can be proper subjects of judicial notice, and Cox's statements fail to satisfy this requirement. The arguments offered by Cargill against Varni's request for judicial notice possess considerable force.

We need not resolve the dispute over whether judicial notice of this evidence would be proper, however, because the documents Varni seeks to add to the record would not change the result in this case, for several reasons. First, the documents support Cargill's theory that Cargill was not part of the "Group of Four" or the "Group of Five" (the terms used by the citric acid conspirators in referring to themselves). Second, Cox's statements in the FBI report show, at best, that Cox engaged in sporadic price discussions with one individual at Cargill, which evidence is neither sufficient to survive summary judgment under *Baby Food* nor probative of the industry-wide conspiracy alleged by Varni. Third, the documents upon which Varni seeks to rely do not comport with Varni's theory that Cargill joined the conspiracy when it joined ECAMA in May 1993, since the FBI report on which Varni relies makes clear that the conspirators considered asking Cargill to join the conspiracy in 1995—some two years after Cargill joined ECAMA. In sum, even if we were to grant Varni's request for judicial notice, the new evidence would not alter the outcome because it appears to be inconsistent with Varni's theory of the case.

L

Applying the legal framework set forth in *Matsushita* and developed through several subsequent cases in this circuit, we have concluded that none of the various pieces of evidence offered by Varni supports a reasonable inference that Cargill conspired to fix prices because none of the evidence, when considered individually, tends to exclude the possibility that Cargill acted independently.[9] The crucial question, however, is whether the evidence *considered as a whole* can support an inference of conspiracy on Cargill's part. As we stated at the outset of this analysis, such an inference may still be plausible when looking, as we must, at the big picture. Summing the iotas up, of course, makes it more difficult to say whether a reasonable factfinder could conclude that Cargill was more likely than not a conspirator, especially in light of the fact that this case is unique in that several citric acid manufacturers have already admitted to conspiring about prices.

Considered as a whole, the evidence in the record, though it clearly shows that several citric acid producers conspired to fix prices and to allocate market shares, does

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[9]Varni argues that the reports of its expert economist, Robert G. Harris, mandate the denial of Cargill's summary judgment motion. Harris concluded that a company acting independently would not have done many of the things that Cargill did. Purported to be irrational absent conspiratorial behavior on the part of Cargill were Cargill's decision to join ECAMA (the strongest piece of evidence in Harris's view), the virtual identity in list prices among citric acid producers, Cargill's failure to increase its market share between 1993 and 1995, its failure to expand its annual production capacity by more than it did, its decision not to enter the European citric acid market sooner, and the fact that, "given the number and type of known contacts—to say nothing of other possible communications—between Cargill and personnel of the admitted conspirators, it is inconceivable that Cargill remained ignorant of the existence of the conspiracy." We have already considered all the evidence discussed by Harris, *see supra* Part III.A–III.L, and our conclusion that no piece of evidence tends to exclude the possibility that Cargill acted independently is not affected by the conclusory statements in the expert report to the contrary. *See Brooke Group*, 509 U.S. at 242, 113 S.Ct. 2578.

not tend to exclude the possibility that Cargill acted independently—and thus does not support a reasonable inference that *Cargill* was involved in the citric acid price-fixing conspiracy. Cargill has offered reasonable legitimate explanations for joining ECAMA, for its strategic decisions relating to expansion, for its citric acid pricing, and for the various other pieces of evidence offered by Varni purportedly showing that Cargill engaged in price fixing. We note that all four major citric acid manufacturers admitted to conspiring to fix prices but none identified Cargill as a co-conspirator. All in all, there is no more than a scintilla of evidence that Cargill was a participant in the citric acid conspiracy, and the existence of "a scintilla of evidence of concerted, collusive conduct" is not sufficient for Varni to overcome Cargill's summary judgment motion. *Baby Food*, 166 F.3d at 137.[10] Thus, the district court did not err in granting summary judgment in favor of Cargill.

IV

Finally, we address whether the district court abused its discretion in denying Varni's motion to compel Coopers & Lybrand L.L.P. ("C&L–US") to produce various documents in its possession and in the possession of Societe Fiduciare Suisse Coopers & Lybrand ("C&L–Switzerland"), which had performed certain accounting and auditing work for ECAMA.

A

C&L–Switzerland and C&L–US are both members of Coopers & Lybrand International ("C&L International"), an association (organized under the laws of Switzerland) consisting of member accounting firms around the world (including C&L–US and C&L–Switzertand). By virtue of

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[10]Because the evidence must, on summary judgment, be construed to the greatest extent reasonably possible in favor of finding an antitrust violation, rare is the antitrust case in which there is absolutely no evidence which could support some inference of an antitrust violation.

membership in C&L–International, member firms are allowed to utilize the Coopers & Lybrand name. Although members use the "Coopers & Lybrand" name, each firm is autonomous. Firms do not share profits or losses, nor do they have any management, authority, or control over other member firms. In addition, C&L–International does not exercise management, authority, or control over member firms. Of particular relevance to the case at hand, C&L–US does not have any economic or legal interest in C&L–Switzerland, and C&L–Switzerland has no such interest in C&L–US.

Varni served C&L–US with a subpoena to produce various documents in its possession and in the possession of C&L–Switzerland. C&L–US produced all the relevant documents in its possession and wrote a letter to C&L–Switzerland asking if it would voluntarily turn over the documents sought by Varni. C&L–Switzerland declined. Varni then filed a motion to compel C&L–US to produce C&L–Switzerland's documents. The magistrate judge ruled that, under Federal Rule of Civil Procedure 45(a), Varni could compel only C&L–US to produce those records in its legal control. Finding that C&L–US lacked legal control over documents held by C&L–Switzerland, the magistrate denied the motion to compel in an order subsequently adopted by the district court. Varni argues that the district court abused its discretion by denying its motion to compel.

B

The Federal Rules of Civil Procedure require a party served with a subpoena for records to produce those records that are in its "possession, custody or control." Fed.R.Civ.P. 45(a). The documents in question are neither in the possession nor custody of C&L–US. Thus, the only question before us is whether C&L–US has "control" over documents in the possession of C&L–Switzerland.

"Control is defined as the legal right to obtain documents upon demand." *United States v. International*

Union of Petroleum & Indus. Workers, 870 F.2d 1450, 1452 (9th Cir.1989) ("*International Union*"). In *International Union*, the Department of Labor had served a subpoena on the International Union of Petroleum and Industrial Workers ("IUPIW"), seeking records from local unions affiliated with IUPIW. The court concluded that IUPIW lacked legal control over documents in the possession of local unions because IUPIW and each local union were separate entities under the law and be cause the contract governing the union relationship did not expressly give IUPIW the right to obtain the records of local unions upon demand. *See id.* at 1452-53. Although there was a theoretical possibility that IUPIW could dissolve a local union and thereby gain access to the documents of the dissolved union, the court deemed this remote possibility insufficient to give IUPIW "control" for purposes of Federal Rule 45(a). The court emphasized that proof of theoretical control is insufficient; a showing of actual control is required. *See id.* at 1453-54.

Varni concedes—as it must—that the district court's ruling was correct under an application of the legal control test, because there is no dispute that C&L–US lacks the legal ability to obtain documents from C&L–Switzerland. Just as IUPIW and the local unions were separate entities under the law, so are C&L–US and C&L–Switzerland. Also as in *International Union*, there is no contract giving C&L–US the right to compel C&L–Switzerland to furnish it with documents in C&L–Switzerland's possession.

Recognizing that the district court's ruling is entirely consistent with *International Union*, Varni urges this court to reject the legal control test used in *International Union*. It asks us instead to define "control" in a manner that focuses on the party's practical ability to obtain the requested documents and argues that *International Union* does not foreclose the application of this practical-ability-to-obtain documents test, because *International Union*'s decision to apply the legal control test rather than the practical-ability-to-obtain-documents test is purportedly "an unexamined

assumption," which *stare decisis* does not compel the present court to follow.

Even if *International Union* does not conclusively settle the question, we conclude—consistently with all of our sister circuits who have addressed the issue—that the legal control test is the proper standard under Rule 45. *See Cochran Consulting, Inc. v. Uwatec USA, Inc.*, 102 F.3d 1224, 1229-30 (Fed.Cir.1996); *In re Bankers Trust Co.*, 61 F.3d 465, 469(6th Cir.1995); *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1426 (7th Cir.1993); *Gerling Int'l Ins. Co. v. Commissioner*, 839 F.2d 131, 140-41 (3d Cir.1988); *Searock v. Stripling*, 736 F.2d 650, 653 (11th Cir.1984). Ordering a party to produce documents that it does not have the legal right to obtain will oftentimes be futile, precisely because the party has no certain way of getting those documents. Varni claims that C&L–US has the practical ability to obtain documents from C&L–Switzerland because C&L–Switzerland has voluntarily furnished C&L–US with documents and information in the past. With respect to the ECAMA documents, however, C&L–US has asked C&L–Switzerland to produce those documents, but C&L–Switzerland refused. There is no mechanism for C&L–US to compel C&L–Switzerland to produce those documents, and it is not clear how Varni wants C&L–US to go about getting the ECAMA documents, since C&L–Switzerland could legally—and without breaching any contract—continue to refuse to turn over such documents. Because C&L–US does not have legal control over C&L–Switzerland's documents, Varni could not compel C&L–US to produce those documents.

V

For the foregoing reasons, we conclude that the district court did not err either by granting summary judgment in favor of Cargill or by denying Varni's motion to compel.
AFFIRMED.

DECISION OF THE UNITED STATES DISTRICT COURT
In Re CITRIC ACID ANTITRUST LITIGATION.
This document relates to all actions.
MDL No. 95-1092 and Master File No. C-95-2963 FMS
United States District Court,
N.D. California
October 1, 1996, Decided
October 2, 1996, FILED

ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION
FERN M. SMITH, DISTRICT JUDGE

INTRODUCTION

The individual *2 and representative plaintiffs ("plaintiffs") seek certification under Federal Rule of Civil Procedure 23(a)(1)-(4) and 23(b)(3) of the following plaintiff class ("class"):

All persons and entities in the United States (excluding governmental entities, defendants, defendants' parents, subsidiaries and affiliates, and other producers of citric acid and their subsidiaries and affiliates) who purchased citric acid directly from any of the defendants at any time during the period from January 1, 1991 to and including June 30, 1995.[11]

The class alleges a conspiracy among defendants to raise, fix, maintain, and stabilize prices of citric acid throughout the United States, and to allocate their major customers or accounts among themselves for the purpose of selling citric acid in violation of section one of the Sherman Act, *15 U.S.C. §1,* and sections four and sixteen of the Clayton Act, *15 U.S.C. §15,* 26.

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[11]Plaintiffs seek to interpret this definition as including those who purchased citric acid outside the United States, as well. The definition is not susceptible to this interpretation.

BACKGROUND

Citric acid is an amino acid derived from corn. It comes in a *3 variety of forms, including crystal, powder, and liquid, and has a wide range of uses. It is used as a preservative and flavoring agent in food; as a phosphate substitute in cleaning products; as a flavoring and stabilizing agent in pharmaceuticals; for industrial cleaning and finishing; and in agriculture. Defendants in this lawsuit are major manufacturers, sellers, and/or distributors of citric acid in the United States.

In June 1995, the Department of Justice began an investigation into possible antitrust violations in the citric acid industry. In August 1995, plaintiffs, who are purchasers of citric acid, began to file claims against defendants.

Plaintiffs allege a conspiracy among defendants to raise, fix, maintain, and stabilize prices of citric acid throughout the United States, and to allocate their major customers or accounts among themselves. Defendants allegedly effected the conspiracy by discussing and agreeing on general price increases; approving and issuing general price increases to reflect their agreements; and monitoring and enforcing adherence to those prices. As a result, plaintiffs allege,. purchasers of citric acid paid artificially high and non-competitive prices *4 for the product. Plaintiffs seek declaratory and injunctive relief, as well as treble damages under antitrust law.

Plaintiffs proffer six class representatives. Trans-Packers Services Corp., of New York, is a contract packaging firm that prepares dry food and beverages for the Department of Defense and large private companies. Varni Brothers Corp., of California, manufactures, bottles, cans, and distributes soft-drinks and other beverages. The 7-Up Bottling Company of Philadelphia was, until a recent asset sale, a major soft-drink bottling company in the mid-Atlantic region. Southeastern Specialty Foods, of Mississippi, was a manufacturer and bottler of fruit beverages until the fall of

1994. Gangi Brothers, of California, is a processor of tomato products. The 7-Up Bottling Company of San Francisco is a major soft-drink bottling company in the western region.

DISCUSSION

I. Evidentiary Burden and Standard for Class Certification

The burden of proving that a class is appropriate rests with the proponent of the class. *In re Northern Dist. of Cal. Dalkon Shield IUD Prod. Liab. Litig., 693 F.2d 847, 854 (9th Cir. 1982);* Shields v. Smith, 1992 Transfer Binder *5 *Fed. Sec. L. Rep. (CCH) P 97,001, 94,376 (N.D. Cal. 1992).* The party seeking to maintain the action as a class suit must, therefore, establish a prima facie showing of each of the four certification prerequisites and must demonstrate that appropriate grounds for a class action exist. *Blackie v. Barrack, 524 F.2d 891, 901 (9th Cir. 1975),* cert. denied, *429 U.S. 816, 50 L. Ed. 2d 75, 97 S. Ct. 57 (1976).* The failure to carry this burden as to any one of the requirements precludes the maintenance of the lawsuit as a class action. *Rutledge v. Electric Hose & Rubber Co., 511 F.2d 668, 673 (9th Cir. 1975).*

Class certification is governed by Federal Rule of Civil Procedure 23, which provides for a two-step procedure. First, subsection (a) of Rule 23 sets out four conjunctive requirements that must be met in all class actions:
(1) the class must be so numerous that joinder of all members is impracticable, (2) there must be questions of law or fact common to the class, (3) the claims or defenses of the representative parties must be typical of the claims or defenses of the class, and (4) the representative parties must fairly and adequately protect the *6 interests of the class.

If these requirements are met, the proponent must also show that it has met one of the four disjunctive prerequisites of subsection (b) of Rule 23. Under this subsection, the Court must find either: (1) that common questions of law or

fact predominate and that a class action is superior to other available methods of adjudication; (2) that the defendant acted or refused to act on grounds generally applicable to the class, so that declaratory or injunctive relief is appropriate with respect to the entire class; (3) that the prosecution of individual actions would create a risk of inconsistent verdicts that would establish incompatible standards of conduct for defendant; or (4) that adjudication of individual claims would be dispositive of the claims of non-party class members, or substantially impede the ability of non-party class members to pursue their own claims. Fed. R. Civ. P. 23(b)(1)-(3).

Before ordering that a lawsuit may proceed as a class action, the trial court must rigorously analyze whether the class action allegations meet the requirements of Rule 23. *General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 161, 72 L. Ed. 2d 740, 102 S. Ct. *7 2364 (1982); Hanon v. Dataproducts Corp., 976 F.2d 497, 509 (9th Cir. 1992).* Because the early resolution of the class certification question requires some degree of speculation, however, all that is required is that the Court form a "reasonable judgment" on each certification requirement. In formulating this judgment, the Court may properly consider both the allegations of the class action complaint and the supplemental evidentiary submissions of the parties. *Blackie, 524 F.2d at 900-01 & n.17.*

II. Analysis

A. Rule 23(a) Requirements

1. Numerosity

Rule 23(a)(1) requires that the size of the proposed class be so large that joinder of all class members is impracticable. There is no set numerical cut-off. *Welling v. Alexy, 155 F.R.D. 654, 656 (N.D. Cal. 1994)* (citing example of approved class with fourteen members, and case in which

certification was denied for class of more than 300).

Plaintiffs are unable to give a precise number of class members at this stage; however, they maintain that based on the nature of the citric acid market and the allegation of a nationwide conspiracy, the total number of class members will be in the thousands. *8 Pls.' Mem. at 8. A finding of numerosity may be supported by such common-sense assumptions. *Scholes v. Stone, McGuire & Benjamin, 143 F.R.D. 181, 184 (N.D. Ill. 1992).* Defendants do not dispute that this first requirement is met.

2. Common Questions of Law or Fact

Rule 23(a)(2) requires that there be questions of law or fact common to the members of the proposed class. Plaintiffs argue that their antitrust claims against defendants involve common legal and factual questions regarding the existence, scope, and effect of the alleged price-fixing conspiracy. In deciding to transfer this litigation to the Court, the Judicial Panel on Multidistrict Litigation expressly found that the actions present common questions of fact. In re Citric Acid Antitrust Litig., MDL-1092, at 4-5 (J.P.M.L. 1995). Defendants do not dispute that this requirement is met.

3. Typicality

Rule 23(a)(3) requires that the claims or defenses of the plaintiff seeking to be the named representative for the class be typical of those of the other members of the class for which certification is sought. The claims and defenses are typical if they stem from the same event, practice, or course of conduct *9 that forms the basis of the claims of the class and are based on the same legal or remedial theory. *Jordan v. County of Los Angeles, 669 F.2d 1311, 1321 (9th Cir. 1982),* vacated on other grounds, *459 U.S. 810 (1982).*

The alleged underlying course of conduct in this case

is defendants' conspiracy to fix the price of citric acid and to allocate customers among themselves during the period from January 1, 1991 through June 30, 1995. The legal theory that plaintiffs rely on is antitrust liability. Because plaintiffs and all class members share these claims and this theory, the representatives' claims are typical of all. See In re Amino Acid Lysine Antitrust Litig., No. 95 C 7679, MDL-1083, at 16 (1996). Defendants do not dispute that this requirement is met.

4. Adequacy of Representation

Rule 23(a)(4) requires that the plaintiff seeking to certify a class demonstrate that as the representative of the class she will fairly and adequately protect the interests of the class. Parties are generally considered to be adequate representatives of absent class members if there are no conflicts of interest between the representatives and class members, and if the Court is persuaded *10 that counsel for the representatives will vigorously pursue the action. *General Tel. Co. of Southwest v. Falcon, 457 U.S. at 157 n.13.*

Defendants contend that the proffered representatives are inadequate because (1) they are unfamiliar with the case, and (2) they are not truly representative of the class.

a. Familiarity With the Case

In determining the adequacy of representation of a class, "the emphasis has been and should be placed on whether the representative's counsel is capable." Shields v. Smith, 1992 Transfer Binder *Fed. Sec. L. Rep. (CCH) P 97,001, at 94,377 (ND. Cal. 1992); Weinberger v. Jackson, 102 F.R.D. 839, 845 (N.D. Cal. 1984).* Defendants do not contest the qualifications of plaintiffs' counsel. They do contest the named plaintiffs' familiarity with the case, however, and that is also a factor that courts consider in

determining adequacy.

The threshold of knowledge required to qualify a class representative is not high; a party must be familiar with the basic elements of his claim, *Burkhalter Travel Agency v. MacFarms Int'l, Inc., 141 F.R.D. 144, 153-54 (N.D. Cal. 1991),* and will be deemed inadequate only if she is "startlingly unfamiliar" *11 with the case. *Greenspan v. Brassler, 78 F.R.D. 130, 133-34 (S.D.N.Y. 1978);* see also *Welling v. Alexy, 155 F.R.D. at 659* (plaintiff inadequate because he showed a "complete lack of interest in the conduct of the case"); *Koenig v. Benson, 117 F.R.D. 330, 337 (E.D.N.Y. 1987)* (plaintiff inadequate because of "alarming unfamiliarity" with lawsuit).

It is not necessary that a representative "be intimately familiar with every factual and legal issue in the case." In re Worlds of Wonder Sec. Litig., 1989-1990 Transfer Binder *Fed. Sec. L. Rep. (CCH) P 95,004, 95,627 (N.D. Cal. 1990).* It is enough that the representative understand the gravamen of the claim. Id. Those courts that have found representatives inadequate have done so because plaintiffs knew nothing about the case and completely relied on counsel to direct the litigation. E.g., *Rolex Employees Retirement Trust v. Mentor Graphics Corp., 136 F.R.D. 658, 665-66 (D. Or. 1991).*

Defendants make a series of arguments regarding the familiarity of each representative with the litigation. They contend that plaintiffs are unfamiliar with the parties and counsel in the case, the procedural history of the case, *12 the market for citric acid, and their responsibilities as class representatives. See Defs.' Mem. at 6-11. Defendants also assert that plaintiffs have no personal knowledge of any price-fixing. Id.

Based on a review of the deposition testimony presented by plaintiffs and defendants,[12] the Court finds that

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[12]The Court's analysis is hindered by the failure of either side to
(continued . . .)

plaintiffs have a basic understanding of the contours of the case, their own purchase and use of citric acid, and the role of class representatives in general. Plaintiffs' corporate representatives do not have comprehensive knowledge of the litigation; however, the inability to name all defendants, to explain the strategy underlying the complaint, or to understand how antitrust damages are calculated does not amount to startling unfamiliarity.[13]
*13

This case is distinguishable from authority cited by defendants. For example, in Burkhalter Travel Agency v. MacFarms Int'l, Inc., the court deemed the plaintiff an inadequate representative because its executives did not understand who the defendants in the action were, did not know the composition of the class, and did not understand purchasing and pricing policies in their own firm or in the industry. *141 F.R.D. at 154.* In Rolex Employees Retirement Trust v. Mentor Graphics, the representative could not describe the allegations of the complaint. *136 F.R.D. at 666.* In Welling v. Alexy, the representative was a frequent filer, who stated that his only role was to alert his lawyers that there was a possible case. *155 F.R.D. at 658.*

In this case, the proposed representatives all know that defendants were manufacturers, sellers, and distributors of citric acid; are able to identify the major defendants; understand that they the class is made up of purchasers of citric acid who may have been the victims of price-fixing;

(. . . continued)
provide complete deposition transcripts. This evaluation is therefore based only on review of selected excerpts.

[13]Moreover, defendants' allegations of unfamiliarity frequently overstate the case. For example, defendants suggest that Daniel Weiss, corporate representative for Trans-Packers Services, had "no idea" about Trans-Packers' purchase volume in recent years. Def. Mem. at 7. In fact, the deposition transcript reveals that Mr. Weiss characterized the volume as small, and merely stated that he could not give precise percentages. Weiss Dep. at 17. Read in context, the testimony of the corporate representatives does not demonstrate startling unfamiliarity.

and demonstrate an understanding of the purchase and use of citric acid in their own businesses.

Regarding defendants' argument that plaintiffs have no *14 personal knowledge of price-fixing, defendants do not cite, nor is the Court aware of, any authority requiring personal knowledge to establish familiarity with a class action. Moreover, it defies common sense that plaintiffs alleging a conspiracy would have personal knowledge of it, unless they were involved. presumably, if plaintiffs had been involved as beneficiaries of the conspiracy, they would not need to bring this lawsuit.

For these reasons, the Court finds the proffered representatives to be sufficiently familiar with the litigation.

b. Representativeness

In determining adequacy of representation, the Court must evaluate the ability of the named representatives to represent the interest of the class fairly and adequately. *In re Diasonics Sec. Litig., 599 F. Supp. 447, 452 (N.D. Cal. 1984).* This inquiry focuses on whether the representative has antagonistic or conflicting interests with the unnamed class members. *Weinberger v. Jackson, 102 F.R.D. at 844-855.*

Defendants argue that plaintiffs do not adequately represent the broader class for a number of reasons:

- All except 7-Up, San Francisco purchased citric acid only sporadically during the class period;
- *15 Southeastern Specialty and 7-Up, Philadelphia are no longer involved in businesses that use citric acid;
- Trans-Packers Services and Gangi Brothers have not purchased from defendants recently;
- 7-Up, San Francisco and Varni Brothers both purchased from cooperatives; and
- None of the plaintiffs purchased any non-food grade citric acid.

The Court finds that the variety among plaintiffs with regard to frequency, continuity, recency, and mode of purchase actually contributes to their representativeness because there will likely be similar diversity among members of the class. Having representatives who were small or sporadic purchasers, who have since stopped using citric acid, or who bought from cooperatives assures that class members in similar circumstances will have their interests protected.[14] *16

Defendants' argument that the named plaintiffs will not adequately represent the interests of class members who purchased different kinds of citric acid raises a more serious concern. The inquiry here, however, is not how many kinds of citric acid plaintiffs purchased, but rather whether each representative has sufficient incentive to present evidence that will establish the existence of the alleged conspiracy and its effect on the prices of all of the products purchased by the class members. See *In re Industrial Diamonds Antitrust Litig., 167 F.R.D. 374, 1996 WL 380234, *5* (S.D.N.Y. 1996).

In cases in which plaintiffs allege that defendants conspired to set an artificially inflated base price for products, courts consistently certify classes because the complaints themselves provide sufficient incentive—individual plaintiffs cannot prove their own claims without proving the class claims. See id. at *8 (citing seven such cases). This case presents exactly that situation. The Court therefore finds the Proffered plaintiffs to be adequate class representatives.

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[14]Defendants assert that purchasing through a cooperative is not the norm. This fact actually supports the need for class representatives who used cooperatives to assure that their interests do not go unheard in the litigation.

B. Rule 23(b) Requirements

Plaintiffs argue that this class action can be maintained under Federal Rule of Civil Procedure *17 23(b)(3) because common questions of law or fact in the case predominate over questions affecting only individual members. In deciding this question, the Court must focus on liability issues. *In re Sugar Indus. Antitrust Litig., 73 F.R.D. 322, 345 (E.D. Pa. 1976).*

To succeed in this action, plaintiffs will have to prove (1) that there was a conspiracy to fix prices in violation of the antitrust laws; (2) that prices were fixed pursuant to the conspiracy; and (3) that plaintiffs purchased products at prices that, as a result of the conspiracy, were higher than they should have been. See, e.g., *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 339-41, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990).* On a motion for class certification, "plaintiffs' burden is to establish that common or 'generalized proof' will predominate at trial with respect to these three essential elements of their antitrust claim." *In re Industrial Diamonds Antitrust Litig., 167 F.R.D. 374, 1996 WL 380324,* *6 (S.D.N.Y. 1996) (quoting *In re Domestic Air Transp. Antitrust Litig., 137 F.R.D. 677, 685 (N.D. Ga. 1991)).* Defendants do not dispute that the existence of the conspiracy and the alleged price-fixing are *18 common to the litigation. They contend, however, that plaintiffs cannot show common impact, and therefore individual issues of fact and law will predominate.

Defendants argue that because citric acid comes in many forms and is used for many purposes, the pricing varies between products, making common proof of impact impossible. Diversity of products and pricing does not necessarily mean that plaintiffs cannot show class-wide impact, however. "Contentions of infinite diversity of product, marketing practices, and pricing have been made in numerous cases and rejected." *In re Folding Carton Antitrust Litig., 75 F.R.D. 727, 734 (N.D. Ill. 1977).*

Some courts find as a matter of law that impact can be shown on a class-wide basis in antitrust cases because "as a general rule, an illegal price fixing scheme presumptively impacts upon all purchasers of a price-fixed product in a conspiratorially affected market." E.g., *In re Alcoholic Beverages Antitrust Litig., 95 F.R.D. 321, 327 (E.D.N.Y. 1982).* A smaller number of courts carefully examine the facts of each case in order to determine whether common proof of impact is possible. E.g., *Windham v. American Brands, Inc. 565 F.2d *19 59 (4th Cir. 1977).* Even those courts that require plaintiffs to make a showing that common impact can be proven only require that plaintiffs "come forward with seemingly realistic methodologies," as plaintiffs have done in this case. *In re Brand Name Prescription Drug Antitrust Litig., 1996 WL 478547,* at *5 (N.D. Ill. 1994); see also *In re Industrial Gas Antitrust Litig., 100 F.R.D. 280, 289 (N.D. Ill. 1983).*

Those cases in which courts have denied class certification for inability to prove common impact have involved additional complications; for example, different market conditions, *Burkhalter Travel Agency v. MacFarms Int'l, Inc., 141 F.R.D. 144, 154 (N.D. Cal. 1992),* and individualized pricing and credit negotiation. *American Custom Homes v. Detroit Lumberman's Ass'n, 91 F.R.D. 548, 551 (E.D. Mich. 1981).* See also *In re Hotel Telephone Charges, 500 F.2d 86, 89 (9th Cir. 1974)* (forty million plaintiffs stayed in 600 different hotels).

This case seems more akin to *In re Industrial Diamonds Antitrust Litig., 167 F.R.D. 374, 1996 WL 380234 (S.D.N.Y. 1996),* and other cases in which plaintiffs have alleged that defendants conspired to set list prices for a variety of products. *20 See also *In re Potash Antitrust Litig., 159 F.R.D. 682 (D. Minn. 1995); In re Glassine & Greaseproof Paper Antitrust Litig., 88 F.R.D. 302 (E.D. Pa. 1980).* Because plaintiffs planned to prove at trial that defendants set artificially high list prices for their products, those courts certified the classes. The high list prices proved

the fact of impact, even if the degree of impact differed between products and purchasers.

Plaintiffs have submitted the declaration of Robert G. Harris, an economist, who avers that he has identified at least three formulae to measure the class-wide impact of price-fixing in this case: one that compares the list prices for citric acid products before, during, and after the alleged conspiracy; one that analyzes the economic rate of return in the industry; and one that compares industry capacity utilization and citric acid prices. Harris Decl. at 15-16. Dr. Harris expresses the most confidence in the "before and after" approach because of defendants detailed financial reporting, which he says will make it possible to calculate competitive benchmark prices for citric acid products and therefore measure overcharge. Harris Decl. at 14-15. This submission *21 is sufficient to show that means exist for proving impact on a class-wide basis, which is all that is required under the authority cited by defendants. See, e.g., *Klein, 94 F.R.D. at 660-661* (certification denied because data essential to methodology for calculating impact did not exist).[15]

Even if common impact cannot be proven, the Court may certify the class. The great weight of authority suggests that the dominant issues in cases like this are whether the charged conspiracy existed and whether price-fixing occurred. See, e.g., *In re Potash Antitrust Litig., 159 F.R.D. 682, 693-96 (D. Minn. 1995); In re Folding Carton Antitrust Litig., 75 F.R.D. 727, 734-35* ("courts have consistently *22 found the conspiracy issue the overriding, predominate question") (N.D. Ill. 1977); *In re Sugar Indus. Antitrust Litig. 73 F.R.D. at 342-355.* Moreover, class certification

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[15]Defendants correctly identify shortcomings with plaintiffs' other proposed methodologies; Dr. Harris does not suggest an industry to which citric acid can be compared for purposes of evaluating economic rate of return, and he cannot "confidently recommend" the capacity utilization approach. Harris Decl. at 16.

does not require that the common questions be completely dispositive of the litigation. *In re Sugar Indus. Antitrust Litig., 73 F.R.D. at 344.*

Because plaintiffs have presented a method for proving common impact, and because even without proof of class-wide impact, common issues predominate, the Court finds that plaintiffs have satisfied the requirements of Rule 23(b).

C. Court's Authority to Reconsider

Class actions play an important role in the private enforcement of antitrust actions. For this reason, courts resolve doubts in these actions in favor of certifying the class. *In re Potash Antitrust Litis., 159 F.R.D. at 688-69.* The Court retains the authority, however, to withdraw class certification in part or in whole, should the questions of adequate representation or predominance of common issues develop so as to make a class action unwarranted. *Social Serv. Union, Local 535 v. County of Santa Clara, 609 F.2d 944, 948-49 (9th Cir. 1979).* Other options short of decertification are also *23 available to the Court if individual issues arise but do not predominate. These include referral to a magistrate judge or creation of subclasses. *In re Brand Name Prescription Drugs Antitrust Litig., 1994 WL 663590,* at *5 (N.D. Ill. 1994). The Court will not hesitate to exercise these authorities if the circumstances warrant it.

CONCLUSION

For the reasons discussed above, the Court hereby grants plaintiffs' motion for class certification.
SO ORDERED.

DECISION OF THE UNITED STATES DISTRICT COURT, DATED JANUARY 23, 1998

In re CITRIC ACID LITIGATION.
This document relates to all actions.
Nos. MDL 1092 FMS, C 95-2963 FMS.

United States District Court,
N.D. California.
Jan. 23, 1998.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
FERN M. SMITH, DISTRICT JUDGE

INTRODUCTION

Defendant Cargill's motion for summary judgment requires the Court to consider whether there is a genuine issue of material fact about whether Cargill participated in a conspiracy to fix the price and allocate market share of citric acid. The Court holds that no reasonable jury could find that Cargill was a participant, and so grants Cargill's motion.

BACKGROUND

Citric acid is a corn derivative with a wide variety of uses in the manufacture of food, soft drinks, detergents, and pharmaceuticals. The citric acid market is dominated by a small number of major producers. Between 1991 and 1995, four of those producers Haarman & Reimer ("H & R"), Hoffman LaRoche ("HLR"), Jungbunzlauer ("JBL"), and Archer Daniels Midland ("ADM")—admittedly conspired to divide the market among them and to raise the price of citric acid by limiting sales. At high-level meetings top executives known as "masters" allocated market shares to within a tenth of a percent. The masters monitored each other by exchanging their monthly sales figures over the telephone. If a conspirator had sold more than its allocation, it was

required to purchase the excess from its co-conspirators. The conspiracy was implemented by lower level corporate officials known as "Sherpas." During the time of the conspiracy, the price of citric acid rose from $0.63/lb to $0.85/lb.

After learning of the conspiracy, the Department of Justice began an investigation that culminated in criminal charges to which the four conspirators pled guilty. Several civil cases followed closely on the heels of the criminal proceedings. The four companies that bad pled guilty in the criminal prosecution settled. Cargill, Inc., the fifth major producer, however, was not indicted, has not settled and now brings this motion for summary judgment, asserting that it was never a member of the conspiracy.

Defendant Cargill, a privately held company, has only become a large-scale producer of citric acid in the last decade. Cargill did not decide to enter the citric acid market until 1988, but it rapidly built both production capacity and market share. By 1990 it had constructed a plant with an annual capacity of 56 million pounds, which it expanded first to 80 million pounds in 1992 and then to 120 million pounds by 1994. During these years Cargill sold all the citric acid it produced. Cargill's domestic market share rose from 0% in 1990 to about 20% by the mid-1990's. Its citric acid prices generally followed those of the conspirators. During this period of rapid domestic expansion, Cargill was also investigating ways to enter the European, Asian, and Latin American markets. After considering such options as a joint venture with one of its competitors and the purchase of various manufacturing plants, and after holding various meetings with those corporations about those possibilities, Cargill eventually decided to build a new plant in Brazil.

In 1993, Cargill joined the European Citric Acid Manufacturers Association ("ECAMA") which included as members ADM, HLR, H & R, and JBL, as well as several non-conspirator companies. ECAMA is a trade association that collects production and sales data from its members,

audits the data through an independent auditor, and then releases to its members aggregate data but not company-specific information. This process is intended to allow its members to learn about the overall state of the world market without divulging secret information to each other.

In this motion, plaintiffs seek to prove that ECAMA was actually used as a front for the illegal exchange of secrets among the conspirators. They also argue that Cargill's parallel pricing and various meetings with the conspirators provide sufficient circumstantial evidence of participation in the conspiracy to avoid summary judgment. For the reasons set forth in this order, plaintiffs are wrong.

DISCUSSION

I. LEGAL STANDARD

A. Summary Judgment

To withstand a motion for summary judgment, the opposing party must set forth specific facts, admissible in evidence, showing that there is a genuine issue of material fact in dispute. *See* Fed.R.Civ.P. 56(e). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial, "the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

The Court does not make credibility determinations with respect to evidence offered, and is required to draw all inferences in the light most favorable to the non-moving party. *See T.W. Elec. Serv., Inc.*, 809 F.2d at 630-31 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S.

574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)). In doing so, however, the Court may only draw inferences "that are reasonable given the substantive law which is the foundation for the claim," *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 902 (9th Cir.1987), and must not "resort [ ] to guesswork or conjecture," *The Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1151 (9th Cir.1988).

A special rule applies to the use of circumstantial evidence in antitrust cases. "[W]here an antitrust plaintiff relies entirely upon circumstantial evidence of conspiracy, a defendant will be entitled to summary judgment if it can be shown that (1) the defendant's conduct is consistent with other plausible explanations, and (2) permitting an inference of conspiracy would pose a significant deterrent to beneficial procompetitive behavior." *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 906 F.2d 432, 440 (9th Cir.1990) ("*Petroleum Products*"). If the defendant succeeds in making such a showing, "the plaintiff must come forward with other evidence that is sufficiently unambiguous and tends to exclude the possibility that the defendant acted lawfully." *Id.*

Plaintiffs assert that this rule does not apply to conspiracies to raise prices. The Court disagrees. The *Petroleum Products* rule is based on a reading of the Supreme Court's holding in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed. 2d 538 (1986), in which the Court refused to infer an antitrust violation from evidence of price-cutting, because "cutting prices in order to increase business is often the very essence of competition." *Id.*, 475 U.S. at 594. Although one district court from outside the Ninth Circuit has held that the rule of *Matsushita* is limited to conspiracies to reduce prices, *see In re Bulk Popcorn Antitrust Litigation*, 783 F.Supp. 1194, 1197-98 (D.Minn.1991), that is not the rule in the Ninth Circuit, for *Petroleum Products* applied *Matsushita* to a conspiracy to raise prices. *See Petroleum Products* at 436. The Court must therefore apply the *Petroleum Products* rule

to this case.

B. Sherman Act

Section 1 of the Sherman act prohibits "conspiracy . . . in restraint of trade or commerce." 15 U.S.C. § 1. The requirements for a civil conspiracy are the same as for a criminal conspiracy. *See Jones v. City of Chicago*, 856 F.2d 985, 992 (7th Cir.1988). A finding of conspiracy does not require an explicit or formal agreement. *See United States v. General Motors Corp.*, 384 U.S. 127, 142-43, 86 S.Ct. 1321, 16 L.Ed. 2d 415 (1966). "It is enough if you understand the general objectives of the scheme, accept them, and agree, either explicitly or implicitly, to do your part to further them." *Jones* at 992.

C. Slight Evidence Rule

Plaintiffs assert that because the existence of a conspiracy has been proven, they need only provide "slight evidence" that defendant was a member of the conspiracy. The "slight evidence" rule, however, is a rule of criminal appellate procedure not properly applied to a motion for summary judgment. *See Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F.Supp. 1100, 1169 (E.D.Pa 1981), *aff'd in part and rev'd in part on other grounds*, 723 F.2d 238 (3d Cir.1983), *rev'd*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (rule has "no application to a district court determination of a summary judgment motion"). Plaintiffs have cited one case from this district that did apply the slight evidence rule to a defendant's motion for summary judgment in a civil antitrust case. *See U.S. Audio & Copy Corp. v. Philips Bus. Sys.*, 1983 WL 1818, *2 (N.D.Cal.) (Patel, J.). That case, however, is not binding on the Court. Nor is the opinion applicable to this case, for it failed to consider whether the use of the slight evidence rule modified the standard of proof for summary judgment motions

established in Rule 56.

Moreover, the Ninth Circuit has stated that "after much reflection we are of the mind that the slight evidence rule may be of doubtful application when the issue for review concerns whether the defendant was connected with the conspiracy at all." *United States v. Dunn,* 564 F.2d 348, 357 n.21 (9th Cir.1977). Because defendant's connection to the conspiracy is precisely the issue here, and because the Court believes that following the slight evidence rule in a summary judgment motion would be inconsistent with the summary judgment standard established by the Supreme Court, the Court holds that the slight evidence rule does not apply.

II. ANALYSIS

A. Evidence That Cargill was not a Conspirator

Cargill offers convincing direct testimonial evidence that it was not involved in the conspiracy. Most persuasive is the testimony of Hans Hartmann, the President of H & R GmbH, who pled guilty to being a member of the conspiracy. He stated that no one from Cargill attended any of the meetings at which the conspirators allocated market share, (Decl. of Steven C. Keller Ex. 6 ("Pls.' Ex.") at 275-76), and that he never received sales figures from Cargill (*Id.*, at 202). When asked whom he meant by "the conspirators," he listed JBL, HLR, ADM, and H & R, and did not mention Cargill. (*Id.*) He also referred to the conspirators as a "group of four." (*Id.* at 71-72.) In addition, all Cargill employees who were deposed denied that Cargill was involved in a price-fixing conspiracy. (Def.'s Mem. in Supp. of Mot. for Summ. J. ("Def.'s Mem.") at 12.)

It is also significant that there is no direct evidence that Cargill was involved in the conspiracy. Under normal circumstances no inference can be drawn from the lack of direct evidence for, as many cases note, direct evidence of a conspiracy is rare. "[S]olemnized covenants to conspire are difficult to come by in any price fixing case." *In re Plywood*

Antitrust Litigation, 655 F.2d 627, 633 (5th Cir.1981). This case is different. There was abundant direct evidence of conspiracy among four companies: H & R, HLR, JBL, and ADM. In fact, all four companies pled guilty to criminal charges and have been sentenced. None now have any reason to shield Cargill. The utter lack of any direct evidence that Cargill was involved in that conspiracy is therefore quite probative.

B. Lack of Evidence That Cargill Was a Conspirator

In contrast to the strong evidence suggesting that Cargill was not involved in price fixing, plaintiffs' evidence is insufficient to create a genuine issue of material fact. Apparently hoping that quantity will substitute for quality, plaintiffs have submitted voluminous but weak circumstantial evidence that they argue indicates that Cargill was a member of the conspiracy. Although the Court will discuss this purported evidence piece by piece, it is mindful that it must weigh the evidence as a whole, "without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962).

1. Parallel Pricing

In an industry dominated by a few major players, parallel pricing, by itself, is generally insufficient to prove an antitrust conspiracy. *See Petroleum Products*, 906 F.2d at 444-45.[16] This presumption is based on the recognition that

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[16]"In some cases, when a market is highly unconcentrated, parallel pricing alone may be all the proof that is required." *Id.* at 445 n.9. Plaintiffs misquote this sentence, asserting that parallel pricing is all that is required when a market is highly *concentrated.* (Pls.' Mem. in Opp. at 25.) Such an egregious error on a central point of law diminishes

(continued . . .)

interdependent pricing is a common feature of concentrated markets, and on the concern that allowing conspiracy to be found solely on the basis of parallel pricing would deter legitimate pricing decisions. *See id.* at 443-35. Although the parties in this case agree that Cargill's prices tracked those of the conspirators, two circumstances make it particularly difficult to draw any inference of collusion from that pricing evidence. First, the citric acid market is highly concentrated. Second, Cargill has presented evidence that at the time that it was raising its prices in parallel with the rest of the industry, it was producing at full capacity and selling all that it produced. (App. to Cargill's Mot. for Summ. J. ("Def's App.") 1 at 377.) Under those circumstances, undercutting its competitors would have been economically irrational, for Cargill, with nothing left to sell, could not have increased its market share. Likewise, Cargill's sales and marketing plans for 1992 and 1993, which stated that Cargill would follow any price increases by competitors', (Pls.' Ex. 101, 107), are not evidence of conspiratorial behavior, but simply normal business practice for a corporation selling all its production in a concentrated commodity market.[17]

2. Membership in ECAMA

Plaintiffs argue that Cargill's membership in ECAMA is evidence that it was a member of the conspiracy. According to plaintiffs' theory, the conspirators used ECAMA to monitor each others' market shares and make sure no one was "cheating" on their secret agreement. Plaintiffs assert that Cargill was fully aware of ECAMA's role in the conspiracy, and joined the organization not for

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(. . . continued)
plaintiffs' credibility and borders on a violation of Federal Rule of Civil Procedure 11(b)(2).

[17]Plaintiffs' quotations from the sales reports of Fritz Gruber, Cargill's national sales manager, must rationally be interpreted the same way.

any legitimate business purpose, but rather to provide the conspirators with business information that would reassure them that Cargill was not attempting to increase its market share by undercutting prices.

The evidence in no way supports plaintiffs' conspiracy theory about ECAMA. Plaintiffs have not produced any admissible evidence that ECAMA was "a sham and nothing but a pretext to monitor the conspiracy." (Pls.' Mem. in Opp. to Mot. for Summ. J. ("Pls.' Mem.") at 11.) They rely primarily upon a 1995 affidavit executed by FBI agent Brian D. Shepard to obtain a search warrant to search the corporate headquarters of ADM. The affidavit, however, is inadmissible hearsay because it reports what agent Shepard said the cooperating witness said Terry Wilson said; the Court cannot consider inadmissible evidence in a summary judgment motion. *See Hollingsworth Solderless Terminal Co. v. Turley*, 622 F.2d 1324, 1335 n.9 (9th Cir.1980).[18]

Plaintiffs also point to a phrase in the handwritten notes of an ADM employee from an ECAMA meeting. (Pls.' Ex. 105.) The four pages of notes mostly relate to China's production of citric acid. On page three the notes list three requirements for a finding of "dumping," an illegal trade practice that ECAMA members believed China was engaging in: "1) export price below normal value . . . 2) must cause injury . . . and 3) must prove injury was caused by dumping." Then a line is drawn across the page. Below that is written, "Undertaking is a confidential agreement to

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[18]Even if the Court could consider the affidavit, it provides evidence about ECAMA's role that is ambiguous at best. Although the affidavit states that Wilson provided information "about how the citric acid producers used a trade association as a pretext for improper communications concerning pricing and sales volumes," it also states that Wilson said that "the volumes are shared every month, not by ECAMA, but through another method that we have." (Pls.' Ex. 3.) The affidavit thus supports Cargill's contention that although ECAMA meetings provided convenient opportunities for the conspirators to meet privately, ECAMA's data aggregation process was not how sales volumes were shared.

maintain price. Producers must police." In their opposition brief plaintiffs imply that this is an explicit reference to the conspiracy. (*See* Pls.' Mem. at 24.) From the context of the notes, however, this phrase does not appear to be a smoking gun proving ECAMA's involvement in the conspiracy, but simply a small part of an abstract discussion of what generally constitutes illegal trade practices.

Plaintiffs also point to a Cargill memorandum that describes the content of an ECAMA meeting it attended on December 20, 1994. The memorandum states that there was "[a] long debate devoted to prices and volumes. All figures at hand inconsistent. Conclusion was that only real prices could be compiled if members were willing to give real prices." (Pls.' Ex. 186.) Again, from the remainder of the memorandum, it is apparent that this "debate about prices" occurred in the context of a discussion of anti-dumping measures. Moreover, Cornelia Johanna van Dijk, the Cargill employee who wrote the memorandum, testified at her deposition that she recalled the "debate," and that instead it related to a "questionnaire that had to be filled out . . . and it was no discussion on prices." (Def.'s App. 49 at 49.) This testimony is consistent with the memorandum, which concludes, "Jack if you wish I can fax you the questionnaire that has to be filled out." (Pls.' Ex. 186.) The memorandum thus does not support a rational inference that ECAMA was a front for the improper exchange of citric acid price information.

On the other side of the ledger is the sworn testimony of Hans Hartmann. He stated that price fixing and market allocation were never discussed at the ECAMA meetings he attended, and that the conspirators' exchange of information regarding sales volume was "completely separate" from "the information that was provided and compiled . . . through ECAMA." (Def's App. 44 at 277-278.) Based on this evidence, the Court holds that no reasonable juror could find that ECAMA was used as a pretext for the improper exchange of information.

Given the conclusion that ECAMA was a legitimate trade association, the Court cannot draw any inference of conspiracy from Cargill's active participation in the organization, nor from the alleged fact that Cargill was recruited to join by the conspirators. Nor have plaintiffs provided any evidence suggesting that Cargill believed ECAMA to be a monitoring tool for the conspirators.

It is true that ECAMA provided the conspirators with audited information about the overall size of the citric acid market, information that each individual conspirator could then use to determine whether it had the market share to which it was entitled under the conspiracy. That function of providing generic market information, however, is legitimate; allowing the aggregation of company data through a legitimate group such as ECAMA to be used as evidence of conspiratorial behavior would significantly deter membership in trade associations. Under *Petroleum Products*, such an inference is therefore improper, if Cargill can show a legitimate reason for its membership in ECAMA. *See Petroleum Products*, 906 F.2d at 440.

Despite plaintiffs' argument to the contrary, Cargill has shown that it had good business reasons for joining ECAMA. According to a contemporaneous memo written by a Cargill employee, Cargill expected to benefit from ECAMA membership by obtaining "a more accurate picture" of the state of the world market, which was necessary given their global expansion plans, and by being informed about ECAMA's research on new applications for citric acid. (Def's App. 11 at 360-61.) Cargill did recognize that when it first reported its data to ECAMA, its competitors would be able to learn specific information about Cargill by comparing the market totals from before and after it joined; it believed, however, that that effect would last only for the "first several months," (*id.*), a belief that seems quite reasonable given Cargill's rapid growth up to that time. Because Cargill has provided a convincing explanation for its decision to provide its sales data to ECAMA, it would be improper to infer

conspiracy from Cargill's membership, given the deterrent effect such a ruling would have on the legitimate activities of trade associations.

In sum, plaintiffs are urging the Court to peer through a triple lens of speculation: to speculate that ECAMA was a monitoring tool for the conspiracy, to speculate that Cargill knew that, and to speculate that Cargill joined in order to reassure the conspirators that it would not disrupt the conspiracy. The evidence for each link in the chain is weak at best. Drawing an inference of participation in conspiracy on the basis of this evidence would be wholly improper for any rational trier of fact.

3. Business Meetings with Conspirators

In their opposition brief, plaintiffs refer to eighteen meetings that took place between Cargill and various members of the conspiracy between 1991 and 1995. (*See generally* Def.'s App. 60.) Plaintiffs offer three theories for why these meetings show that Cargill was a member of the conspiracy. They argue that the meetings must be considered direct evidence of conspiracy, that prices were improperly discussed at the meetings, and that the meetings provided an opportunity to conspire. The Court rejects each of these theories.

a. Meetings as Direct Evidence

At oral argument, plaintiffs asserted that the meetings between Cargill and its competitors could be considered direct evidence of conspiracy, making *Matsushita* inapposite. *See Petroleum Products*, 906 F.2d at 440-41 ("the *Matsushita* standards do not apply when the plaintiff has offered direct evidence of conspiracy"). As support for the proposition that evidence of a meeting between conspirators should be considered direct, rather than circumstantial, evidence of a conspiracy, plaintiffs rely on *Arnold Pontiac-*

GMC v. Budd Baer, Inc., 826 F.2d 1335 (3rd Cir.1987). Their reliance is misplaced. The direct evidence in that case was not the mere fact that the conspirators met, but rather the fact that at the meeting they explicitly agreed to work together to exclude the plaintiff from the relevant market. *See id.* at 1336. Although Cargill met with the conspirators in this case, there is no evidence that conspiratorial action was ever discussed at those meetings. *Arnold Pontiac* is thus inapposite. The meetings can only be considered circumstantial evidence of conspiracy.

b. Discussion of Prices

Plaintiffs point to four occasions on which Cargill employees discussed citric acid prices with the conspirators as evidence that they were colluding to set prices. Although the exchange of confidential information about specific sales to specific customers can be evidence of anticompetitive behavior, *see United States v. Container Corp. of America*, 393 U.S. 333, 334-37, 89 S.Ct. 510, 21 L. Ed. 2d 526 (1969), the exchange of publicly available information does not support an inference of conspiracy. *See Wilcox v. First Interstate Bank of Oregon*, 815 F.2d 522, 526 (9th Cir.1987). Some of the price information exchanged in this case was already public knowledge. By the time an HLR employee mentioned at an April 17, 1991 meeting with Cargill that the price of citric acid was $0.68/lb (Pls.' Ex. 90, 150), both Cargill and HLR had already informed their customers of that price (Def's App. 52, 56); because each company had already set that price, the statement does not tend to show that the parties used their meeting to collusively arrive at it. Similarly, by the time Cargill informed H & R of its price increase to $0.82/lb at a meeting on September 16, 1992 (Pls.' Ex. 163 at 666), it had already announced that price increase to its customers (Def's App. 51). Moreover, Cargill employee Paul Conway, who was present at the meeting, testified at his deposition that although he did not recall

stating that Cargill was increasing its price to $0.82, "If I knew of any price, it was something that was already publicly available." (Dep. of Paul Conway, Def.'s App. 46, at 43.)

Other mentions of price were innocuous for different reasons. A letter from ADM to Cargill informing them of a price increase appears to relate to a particular sale from ADM to Cargill, not to the ADM's general list price. (*See* Pls.' Ex. 91.) The negotiation of a price in the course of a swap agreement between Cargill and JBL was done, according to Cargill, because it was required by United State transfer pricing law. (Def.'s App. 42, at 123-25.) With regard to all of these meetings, the fact that Cargill discussed prices does not necessarily mean that it agreed to fix prices, or that it improperly exchanged price information. These meetings are circumstantial evidence that is weak at best; they do not support a rational inference that the Cargill was a member of the conspiracy.

c. Opportunities to Conspire

Finally, plaintiffs argue that Cargill's meetings with the conspirators provided opportunities to conspire, and thus are a "plus factor' supporting an inference of conspiracy. Where cooperation is necessary for a legitimate business purpose, the mere opportunity to conspire at business meetings is insufficient to support an inference of conspiracy. *See Wilcox*, 815 F.2d at 527. In evaluating plaintiffs evidence, the Court notes first that one of the disputed meetings took place in 1990, before the admitted conspiracy among the ADM, HLR, H & R, and JBL had even begun. Cargill asserts that this meeting, as well as all the others, were conducted for proper, non-conspiratorial, purposes. Specifically, it asserts that its two meetings with HLR in 1991 and its two meetings with JBL in June 1994 related to Cargill's potential acquisition of citric acid plants. (Def's App. 60.) Cargill argues that at its September 1992

meeting with H & R, the corporations discussed the possible sale of glucose to H & R. (*Id.*) Cargill has thus adequately rebutted this "opportunity" plus factor. Moreover, these meetings have even less probative value when viewed in light of the way the conspiracy admittedly functioned. When H & R, HLR, JBL, and ADM decided to fix prices, they did so by meetings among the "masters" exclusively devoted to price fixing. Cargill was never present at those meetings. Hans Hartmann's deposition does not indicate that the conspirators used legitimate meetings as a front for discussions of price fixing. Nor do plaintiffs even argue that the disputed meetings were attended by the "masters" or the "Sherpas," the only officials at the conspirator corporations who knew about the price-fixing scheme.

4. Notice of Competitors' Price Increases

Plaintiffs assert that Cargill had advance notice of the conspirators' price increases. Although such advance notice would tend to support an inference of conspiracy,[19] the evidence presented in this case does not suggest that Cargill in fact had advance notice. Plaintiffs point the Court to pricing announcements of the conspirators which were found among Cargill's records, and to Cargill pricing announcements which were found in the conspirators' records. (Pls.' Ex. 111-41.) These pricing announcements were apparently sent to customers. Based on their date stamps, they were received by the competitor corporations only after they had been mailed to customers. For example, the H & R pricing announcement in Plaintiffs' Exhibit 111

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[19]The Court states that proposition as a matter of logic, rather than of Ninth Circuit law, for plaintiffs cited no Ninth Circuit decision in this section of their brief. The one case they erroneously asserted to be from the Ninth Circuit is in fact from the Eighth Circuit. *See ES Development, Inc. v. RWM Enterprises, Inc.*, 939 F.2d 547, 554 (8th Cir.1991). (Plaintiffs did, however, cite the case correctly in their table of authorities, if not in the body of their memorandum.)

was mailed to customers on February 24, 1992; it was faxed to Cargill on March 2, 1992. The Court can find no document that appears to have been sent to the competitor corporation first.

The document that comes the closest is plaintiffs' exhibit 113, an ADM price announcement letter that was faxed from one Cargill facility to another on March 13, 1992, which is the same date that appears on the announcement. Plaintiffs argued at the hearing that this letter could not possibly have reached Cargill on the same day it was sent to ADM's customers unless ADM faxed it directly to Cargill. That is a speculative conclusion. Nothing on the fax indicates how Cargill received the letter. The letter may well have been faxed to Cargill from one of its customers, who may have received it from ADM by fax.

There is in fact evidence that Cargill's customers sent it copies of price increases that had been announced by Cargill's competitors. (*See* Def's App. 41 at 233 (deposition testimony of Cargill employee Robert Simpson that "generally if a customer referred to a price announcement, we would ask them to fax it to us.").) The attempt to glean from customers market information about competitors is proper competitive behavior. Holding it to be evidence of antitrust violation would significantly deter such behavior, in violation of *Petroleum Products*.

5. Failure to Expand Capacity as Much as Planned

Plaintiffs argue that Cargill's decision to expand its capacity less than originally planned indicates that it was accommodating the cartel by restraining production. After announcing plans in March 1992 to expand its production capacity from 80 to 160 million pounds per year, in October 1992 Cargill chose instead to expand its plant to 120 million pounds. It is impossible to draw an inference of conspiracy from this evidence. Over the time period in question, Cargill

was not reducing its production, or even holding it steady. Instead, it was increasing production by half. Moreover, an internal Cargill report from October 1992 documents several business reasons for the slower expansion. Cargill was concerned that the switch to liquid extraction technology could decrease product quality and alienate customers, and that the increase in production could drive down prices (although the impact was not expected to be "serious"). (Def's App. 21 at 257-59.) Given these circumstances, no reasonable juror could conclude that Cargill's business decisions were evidence that they were participating in the conspiracy.

6. Flat Market Share

In a related vein, plaintiffs allege that Cargill's market share, after growing rapidly between 1990 and 1993, remained flat between 1993 and 1995. The evidence, though not entirely clear on this point, belies plaintiffs' claim. According to Cargill's internal documents, its North American market share grew from 18.7% in 1993 to 21.0% in 1994. (Def.'s App. 27, at 5.)[20] Moreover, Ernest Micek, a Cargill employee, testified that Cargill's market share "grew annually."

(Def.'s App. 1 at 377.) Plaintiffs assert that Cargill's market share was 22% in 1993, and 21% in 1994 and 1995. As evidence, plaintiffs cite to well over 100 pages of Cargill strategic reports in which the Court is unable to find any clear statement of Cargill's market share. (Pls.' Ex. 92-95.)[21]

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[20]Cargill's market share in the rest of the world was negligible. The document does not give market share for 1995.

[21]*See Schneider v. TRW, Inc.*, 938 F.2d 986, 990 n.2 (9th Cir.1991) ("[A] district court is under no obligation to mine the full record for triable issues of fact."); Schwarzer, *et al.*, *The Analysis and Decision of Summary Judgment Motions*, 139 F.R.D. 441, 480-481 ("(T]he opposing party should specifically identify the portions of the record relied on to enable the court to readily find them.")

The evidence thus indicates that although the growth rate of Cargill's market share slowed during the years of the conspiracy, the share nevertheless increased more than two percent between 1993 and 1995. During this time, the conspirators were allocating market share to within a tenth of a percent. It is impossible to draw an inference of conspiracy from Cargill's market share when it changed so much more than would have been allowed had it been participating in the conspiracy.

7. Fifth Amendment Invocations of Conspirators[22]

Plaintiffs seek to introduce evidence of numerous Fifth Amendment invocations by the conspirators. Such invocations are admissible in a civil case as long as they are relevant and not otherwise barred by the rules of evidence. *See FDIC v. Fidelity & Deposit Co. of Maryland*, 45 F.3d 969, 977 (5th Cir.1995). The Court holds that the depositions are not relevant to this case. When asked whether Cargill was involved in the conspiracy, numerous conspirators invoked their Fifth Amendment right against self-incrimination, doing so for every single question asked. Plaintiffs assert that the conspirators would have exonerated Cargill if they could have done so truthfully, for doing so would have reduced the amount of antitrust injury suffered by the plaintiff class, thus lessening the possible scope of their joint and several treble damage liability. (Pls.' Req. for Jud. Notice of Fifth Amendment Dep. at 6 n.9.) That is pure speculation and lacks logical support.

Many of the questions in the deposition were phrased in a way that made it impossible for the deponents to

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[22]Plaintiffs' filing a separate motion on the Fifth Amendment issue is a transparent attempt to evade the thirty-three page limit the Court set for their opposition brief. Nevertheless, the court will consider plaintiffs' argument on this point.

exonerate Cargill without acknowledging the existence of a conspiracy. For example, one deponent was asked whether "a representative of Haarman & Reimer participated in meetings with representatives of other defendants, including Cargill, and agreed to fix, maintain the price of citric acid in the United States and around the world?" (Pls.' Reg. for Jud. Notice, Ex. 1.) The only inference the Court can draw from the deponent's invocation of the Fifth Amendment in response to that question is that the deponent was refusing to address whether Haarman & Reimer participated in a conspiracy. Although some of the other questions involved Cargill only, the deponents could not have answered those questions, even if they believed Cargill innocent, without appearing to be hiding something in the questions they had refused to answer. Once a party invokes the Fifth Amendment for any question, it is its right to invoke it for all questions.[23] For that reason, no inference that Cargill conspired can fairly be drawn from these depositions.

C. Summary

Even drawing all inferences in plaintiffs' favor, as the Court must,: the evidence in this case fails to raise any genuine issue of fact that defendant Cargill was a member of the conspiracy to fix citric acid prices. Drawing an inference of conspiracy from the evidence proffered by plaintiffs would require the sort of speculation and guesswork that the Court is forbidden to undertake.

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[23]Counsel for Mark Witacre made exactly this point during a deposition, explaining that "I've got to ask my client to even take the fifth on his name because once you take the fifth, you have to invoke the fifth throughout the whole proceeding." (Pls.' Req. for Jud. Notice, Ex. 15, at 7.)

CONCLUSION

Because no reasonable jury could, on the basis of this record, conclude that defendant Cargill was a member of the conspiracy, the Court GRANTS defendant's motion for summary judgment. Judgment will be entered in accordance with this order.

SO ORDERED.

NOT FOR PUBLICATION
[FILED OCTOBER 21, 1999]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: CITRIC ACID LITIGATION 7-UP BOTTLING CO. OF JASPER INC., et al., Plaintiffs, and VARNI BROTHERS CORP., on its own behalf and all others similarly situated dba Seven-Up Bottling of Modesto; 7-UP BOTTLING COMPANY OF PHILADELPHIA, INC. Plaintiffs-Appellants, v. ARCHER DANIELS MIDLAND CO., INC., a Delaware corporation, et al., Defendants, and CARGILL, INC., Defendant-Appellee.	No. 98-15344 DC# MDL-01092-FMS ORDER

Before: O'SCANNLAIN, MCKEOWN, and WARDLAW, Circuit Judges.

The American Antitrust Institute's motion for leave to file amicus brief is GRANTED. The State of California's motion for leave to file amicus brief is GRANTED.

We have given careful consideration to the appellants' argument in the petition for rehearing that the opinion's summary judgment standard conflicts with *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992). We believe this argument is misplaced. Although the *Kodak* Court explained the holding of *Matsushita*, it did not redefine *Matsushita's* summary judgment standard. Moreover, as the Court noted, the "principal issue" in *Kodak* related to tying and market power. *Id.* at 455. *Kodak* was not concerned with the sufficiency of evidence of conspiratorial acts alleged under § 1 of the Sherman Act.

The panel has unanimously voted to deny the petition for rehearing and the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

PERTINENT STATUTES

15 U.S.C. §1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(July 2, 1890, c. 647, §1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282; Dec. 21, 1974, Pub. L. 93-528, §3, 88 Stat. 1708; Dec. 12, 1975, Pub. L. 94-145, §2, 89 Stat. 801; Nov. 16, 1990 Pub.L. 101-588, §4(a), 104 Stat. 2880.)

60A-SF-116504

CARGILL

Cargill, Inc., Eddyville, Iowa, is another manufacturer of citric acid. Between 1992 and 1995, COX had approximately a dozen conversations with BILL GRUBER of Cargill on what COX called a "day-to-day level" regarding pricing for specific accounts. COX and GRUBER both initiated calls to the other at work during business hours. COX received only one of these calls at home. In each of these conversations, COX and GRUBER discussed what each would be bidding to particular CA accounts, including, Lever, Schreiber, M&M Mars, Coca-Cola, and P&G (Proctor and Gamble).

During one conversation with GRUBER, COX discussed leaving the price to M&M Mars where it was. In another conversation about the Lever account, one of them said, "I'm thinking of going in at [for example] 72¢." These discussions usually occurred toward the end of the year when contracts came up for renewal. They would talk about "x" being a good price for an account. On one occasion, GRUBER and COX together talked with Skelly [of Haarmann & Reimer] about the Proctor & Gamble account to identify who obtained the business, after the P&G bid had been made.

The effect of the GRUBER/COX conversations is that Cargill and ADM would bid at close to the same price, but not the identical price, as that would look suspicious. COX felt at the time that his conversations with GRUBER were improper, although he didn't think it was that bad in comparison to what was going on with G-4 and G-5. COX felt it was understood between GRUBER and himself that they should keep quiet about these conversations. WILSON was aware of the COX/GRUBER conversations, as COX told WILSON about them. WILSON never reacted or said anything to COX about the calls.

When Cargill was considering leading a CA price move to 76¢ in approximately the 2nd quarter of 1992, GRUBER called COX to see if ADM would be supportive. COX told GRUBER that he thought it was a good idea. COX believes GRUBER would have known that his response meant ADM would support the increase, and ADM did, in fact, follow the price increase.

In 1992 or 1993, the topic of Cargill came up at an

BEST AVAIL

"unofficial" CA meeting. There was a discussion of how to get messages to Cargill, how to control them, and whether or not Cargill should be given the message to back off, to not rock the boat. TERRY WILSON volunteered that the task to contact Cargill should be left with him. WILSON later mentioned to COX that he talked with MICK ANDREAS about ADM being the one to get a message to Cargill.

Cargill joined ECAMA in May 1993.In late May or early June 1995, the CA group discussed whether or not to invite Cargill to join the CA Group. SCHALLER, of Haarmann & Reimer, made an overture to Cargill. COX was asked to approach Cargill, but he declined. At some point, COX discussed with GRUBER the idea of Cargill joining ECAMA, but apparently Cargill was uncertain about whether ECAMA was a legitimate association. COX believes that Cargill's decision of whether to join ECAMA would have been made at a level higher than GRUBER's.

When the market started to flatten out, COX and GRUBER talked about each's company having to "absorb some of the hurt."

COX had a conversation in early 1992 with CRAEGER SIMPSON, of Cargill regarding buying sodium citrate.

SODIUM GLUCONATE

Overview

COX volunteered information regarding meetings ADM representatives attended with competitors regarding sodium gluconate(SG), a product that is used in industrial cleaners and de-rusting compounds, among other things. COX estimates there were five to ten such meetings between late 1991 and June 1995, at which the attendees discussed quotas and prices for SG, under an arrangement similar to that set up for citric acid. The companies involved in the SG meetings and agreements were:

ADM
Roquette Frères
Fujisawa
Akzo
Jungbunzlauer

ABLE COPY

ADMITTED CONSPIRATOR H&R'S DOCUMENT RE NOT COMPETING WITH OTHER ADMITTED CONSPIRATORS AND CARGILL (FROM 9TH CIRCUIT RECORD: APPELLANT'S EXCERPTS OF RECORD, VOLUME 10, PAGES 276-279)

[Confidential Material - Intentionally Omitted]

Cont'd

ISSUES/CONCERNS

III. **LOSS MARKET SHARE IN CANADA APPROX. 20%** 23.9% from 29% – 93 TO
IN VALUE CANADIAN DOLLAR & CONTINUED DECLINE

- **ACTIONS**
  - PROTECT CURRENT POSITION AT KEY ACCOUNTS.
  - ~~SELL~~ 60% COKE VS. PEPSI. ~~SELL~~ 55% & 50% IN 95 POINTS
  - SELL SELBY PRODUCT WITH DUTY DRAWBACK TO COMPETE WHEN NECESSARY.
  - RE-ESTABLISH POSITION AT CHEESE ACCOUNTS WITH SODIUM CITRATE. IN 2ND HALF 95
  - DO NOT ~~PUT~~ SELL BELOW $2.95/KG FOR REST OF MARKET

H&R(X) 03577

CONFIDENTIAL AND LAWYERS ONLY PURSUANT TO COURT ORDER

ER 00277

A73

H&R(X) 035776
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PURSUANT TO COURT ORDER
ER 00278

A74

Cont'd

ISSUES/CONCERNS

IV. SUPPLY IN SIGNIFICANT EXCESS OVER DEMAND (oversupply) ~~& DOWNWARD~~ PRESSURE ON PRICE. ↓ NO GROWTH IN MARKET

ACTIONS

- PROTECT POSITION AT CURRENT CUSTOMERS. IF POSSIBLE
- GROW AT MAJORS WITH THEIR GROWTH.
- GAIN SHARE AT ACCOUNTS WHERE HAS NO SIGNIFICANT EFFECT ON ADM, CARGILL, JBL SHARE. ~~-~~ TARGETED GADOT. 1700M 5000 1530 MILLS FROM GADOT
- CONTINUE TO WORK ON MARKET EXPANSION OPPORTUNITIES.
  - TEXTILE
  - PROCESSED MEATS
  - ~~PRECIPITATED SODIUM CITRATE FOR LAUNDRY & AUTODISH~~ AUTODISH
  - PAPER WHEN READY

- RE-ESTABLISH MAJORITY POSITION AT ~~[illegible]~~ PROCTER & GAMBLE 2ND HALF 95 ATLIMA ~~2ND [illegible]~~ ~~POSITION~~ ~~#1~~ COLUMBUS MS
  ✓ SUNDOR ~~2ND [illegible]~~
  REMACAMP

CONFIDENTIAL AND LAWYERS ONLY
PURSUANT TO CONT ORDER

H&R(X) 035777

Cont'd

ISSUES/CONCERNS

V. **QUALITY OF OUR PRODUCT VS. COMPETITION**
CITRIC , & MALIC

ACTIONS

- CONTINUE CUSTOMER NEEDS CAT; TOTALLY SOLVE METAL CONTAMINATION.
- ~~USE CAT AS NECESSARY TO MEET OTHER MAJOR CUSTOMER QUALITY NEEDS~~
SUGGEST DON'T FOR MALIC
- USE CAT AS NECESSARY TO MEET OTHER MAJOR CUSTOMER QUALITY NEEDS
of a supplier

Supreme Court, U.S.
FILED
FEB 22 2000
CLERK

(3)

No. 99-1218

In the Supreme Court of the United States

GANGI BROS. PACKING CO., ET AL.,
PETITIONERS,

v.

CARGILL, INCORPORATED,
RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly sustained the district court's grant of summary judgment because petitioners presented no evidence that would support a reasonable inference of respondent's participation in an unlawful conspiracy.

RULE 29.6 STATEMENT

Neither respondent Cargill, Incorporated nor any parent, subsidiary or affiliate has issued shares to the public.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

In this case, the court of appeals unanimously affirmed the district court's conclusion that no reasonable jury could have found that respondent Cargill, Incorporated ("Cargill") participated in a price-fixing conspiracy in the citric acid industry. In their petition for certiorari, petitioners assert that the summary judgment standard applied by the court of appeals conflicts with decisions of this Court and of other courts of appeals, and that all four of the judges below erred in concluding that the evidence in the record failed to raise a genuine issue that Cargill participated in the conspiracy.

Petitioners' claims are entirely meritless. The court of appeals faithfully applied this Court's precedents, and its decision is not in conflict with decisions of any other Circuit. Nor are petitioners' factual claims of any substance. Thus, although petitioners invoke the importance of governmental enforcement of the antitrust laws (Pet. 12-13), they neglect to mention that the Antitrust Division of the Department of Justice — following an extensive investigation, spanning several years, in which it filed criminal charges against the members of the citric acid conspiracy, took guilty pleas from the companies and many of the individuals involved, and secured agreements to cooperate from all of the guilty parties — concluded that "Cargill was not involved in price-fixing in citric acid." See *infra*, pp. 6-8. The courts below did not err in concluding that no reasonable jury could believe otherwise.

Finally, and in any event, this case is a highly unsuitable vehicle for addressing the question presented. As the decisions of both courts below make clear, Cargill would have prevailed — and, indeed, *did* prevail in the district court — under precisely the legal standard for summary judgment that petitioners advocate. See *infra*, p. 19. Moreover, much of petitioners' contrary "evidence" is nowhere to be found in the summary judgment record — a

fact commented on by both courts below. The petition for certiorari should be denied.

STATEMENT

1. In 1990, Cargill entered the citric acid market by constructing a plant with an annual capacity of 56 million pounds. SER 425:2-3.[1] Upon entering the market, Cargill had a market share of 0%. By continuously expanding its capacity, by always producing as much citric acid as it could, and by selling out its entire volume of production, Cargill managed to achieve a U.S. market share of approximately 23% by 1995. SER 425:96, 118-119. Cargill's capacity and volume of actual production increased every year, and it sold every pound of citric acid that it produced. See Pet. App. A54.

Building its market share from 0% in 1990 to 23% in 1995 required Cargill to be an extraordinarily aggressive competitor. In internal documents filed under seal in the court of appeals, Cargill's competitors continuously bemoaned Cargill's competitiveness. See, *e.g.*, SER 426:166, 173, 183, 194, 197. As a result of its competitive tactics, Cargill increased its market share during every year between 1991 and 1995, the period during which the citric acid conspiracy operated. See Pet. App. A63.[2]

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[1] Citations to the record refer to the Supplemental Excerpts of Record ("SER"), Conditional Cross-Request for Judicial Notice ("CRJN"), and the Opposition to Appellant's [Second] Request for Judicial Notice ("ORJN").

[2] Citing no evidence, petitioners assert that "Cargill's market share, which until 1993 had risen meteorically, dipped slightly and then remained flat." Pet. 4. The only evidence in the record is to the contrary, as the court of appeals recognized. See Pet. App. A20 ("there is no evidence in the record supporting [petitioners'] claim that Cargill's market share flattened after 1993"); *id.* A21 n.7 ("the only market share data actually in the record — and thus the only data properly before this court — indicates that Cargill's market share continued to increase even after 1993"); see also *infra*, p. 22.

2. The European Citric Acid Manufacturers Association ("ECAMA") is a trade association formed to promote the interests of the citric acid industry. It is organized under the European Chemical Industry Council ("CEFIC") and operates under European Union law. For the benefit of its members, ECAMA collects and aggregates data on the citric acid industry. As the court of appeals explained, "ECAMA collected figures on production and sales from each of its members, audited this information on an annual basis, and produced statistics aggregated by country on citric acid production and sales. ECAMA members reported production and sales information to an independent agent of ECAMA, who distributed information aggregated by country to members. The reason that only aggregate statistics were distributed was to preserve the confidentiality of individual members' sales and production figures." Pet. App. A14. These activities "served the legitimate purpose of informing members of worldwide citric acid conditions and were, in themselves, wholly legal." *Ibid.*

Because Cargill perceived many benefits to be derived from joining ECAMA, the General Manager of Cargill's citric acid business contacted a CEFIC official to obtain more information. Cargill was assured that ECAMA took pains to avoid any impropriety under the antitrust laws — it maintained strict confidentiality of individual company data, and a CEFIC representative was present at all meetings. SER 425:107-108. In an April 1993 memorandum to his superior and to in-house counsel, the Cargill General Manager carefully examined the costs and benefits of joining ECAMA, ultimately recommending that Cargill should join. SER 426:22A-24. Cargill joined ECAMA only after obtaining specific reassurances regarding the confidentiality of individual company statistics. SER 426:25-40.

3. After the United States announced that it was investigating illegality in the citric acid industry, petitioners sued every major producer of citric acid for violations of the

Sherman Act: Archer Daniels Midland ("ADM"), Haarman & Reimer ("H&R"), Hoffman-LaRoche ("HLR"), Jungbunzlauer ("JBL") and Cargill. While this case was proceeding, the United States prosecuted and secured guilty pleas from the guilty defendants: ADM, H&R, HLR and JBL. Those defendants also settled the civil claims against them. Petitioners continued to press their case against respondent Cargill, the sole remaining defendant.

Eager to obtain testimony from an actual conspirator, petitioners traded about $8 million from H&R's settlement in exchange for the deposition testimony of German citizen Hans Hartmann, President of H&R GmbH, who had previously entered an individual guilty plea to price-fixing in the citric acid industry. SER 426:198-212. In his testimony, Hartmann explained how the citric acid conspiracy worked. It consisted of high-level meetings by the "Masters" to allocate sales volumes and market shares, and to set list-price targets. SER 425:182-185, 188-190. Lower-level employees (the "Sherpas") met to implement the details of the conspiracy. The conspirators communicated monthly by telephone to exchange company-specific information regarding monthly sales figures. SER 425:186-187. The conspiracy was worldwide in scope, and the conspirators attempted to allocate market shares to within one-tenth of a percentage point. SER 425:192-193.

Most pertinently, Hartmann identified the participating members of the conspiracy as H&R, JBL, HLR, and ADM, which were termed the "group of four." SER 425:194-195, 210. Hartmann verified that no Cargill employee had ever attended a conspiratorial meeting. SER 425:209-210. Although he testified that the conspirators exchanged monthly sales data, Hartmann never received Cargill's individual figures. SER 425:186-187, 205-208.

Finally, Hartmann made clear that the conspiracy was "completely separate" from ECAMA. SER 425:210-212.

Although conspirators would occasionally arrange meetings a few days before or after ECAMA meetings, the conspiracy was always conducted outside ECAMA. SER 425:191, 195. Prices were never discussed at ECAMA meetings. SER 425:201.

4. After carefully reviewing all of the evidence — and explicitly relying on the very legal standard that petitioners advocate in this Court (see Pet. 11-12) — the district court held that "no reasonable jury could find that Cargill was a participant" in the citric acid price-fixing conspiracy. It therefore granted Cargill's summary judgment motion. Pet. App. A47-A66.

The court explained first that there was "convincing direct testimonial evidence that [Cargill] was not involved in the conspiracy." Pet. App. A52. By contrast, the court stated, there was no direct evidence of Cargill's participation in the conspiracy.[3] As for petitioners' "voluminous but weak circumstantial evidence" — "[a]pparently" submitted in the "hop[e] that quantity will substitute for quality" (Pet. App. A53) — the district court concluded that it simply did not "create a genuine issue of material fact." *Ibid.*

Focusing upon petitioners' primary theory of the case — that Cargill's membership in ECAMA was proof that it was part of the conspiracy — the court found that "[t]he evidence in no way supports plaintiffs' conspiracy theory about ECAMA." Pet. App. A55. The court conducted a similarly thorough review of the numerous other categories of evidence submitted by the petitioners, but concluded that

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[3] The district court noted that "[u]nder normal circumstances no inference can be drawn from the lack of direct evidence" (Pet. App. A52). Nevertheless the court added, "[t]his case is different." Given that the conspirators had pled guilty to criminal charges of price fixing, and had cooperated with the government's investigation, "the utter lack of any direct evidence that Cargill was involved in that conspiracy is * * * quite probative." *Id.* at A53.

"plaintiffs are wrong" to suggest that their evidence could tend to show that Cargill participated in the citric acid price-fixing conspiracy. *Id.* at A49.

Applying the established summary judgment standard, the district court concluded that "even drawing all inferences in plaintiffs' favor, as the Court must, the evidence in this case fails to raise any genuine issue of fact that defendant Cargill was a member of the conspiracy to fix citric acid prices. Drawing an inference of conspiracy from the evidence proffered by plaintiffs would require the sort of speculation and guesswork that the Court is forbidden to undertake." Pet. App. A65. Because "no reasonable jury could, on the basis of this record, conclude that defendant Cargill was a member of the conspiracy," the court granted Cargill's motion for summary judgment. *Id.* at A66.

5. Petitioners filed a notice of appeal. At the same time, petitioners requested that the court of appeals take judicial notice of the fact that a small Italian producer called Cerestar had recently pled guilty to participating in the citric acid price-fixing conspiracy.

Cargill did not oppose petitioners' request, but it conditionally cross-requested that, if the court of appeals were to take judicial notice of the Cerestar plea proceedings, it should also take judicial notice of other proceedings that put the Cerestar plea in context. During August of 1998, the United States was conducting a criminal prosecution of three ADM executives for price fixing in the lysine industry. Attempting to show that the defendants in that case had patterned the lysine conspiracy after the citric acid conspiracy, the United States called Barrie Cox to testify about the nature of the citric acid conspiracy. Barrie Cox, also an ADM employee, had received immunity from the government by promising full cooperation in its investigation. Cox was uniquely qualified to provide a definitive account of the citric acid conspiracy. Cox operated as both a "Master" and

a "Sherpa" (CRJN, Ex. A, at 2770-2771, 2798-2799), and he testified that he attended "pretty well" every single one of the more than thirty conspiratorial meetings. *Id.* at 2769.

When the attorney for the United States asked him — point blank — whether Cargill was in the conspiracy, Cox testified that Cargill was not a member:

> Q. Mr. Cox, can you name the companies that participated in the citric acid price-fixing and volume allocation conspiracy?
>
> A. Archer Daniels Midland, Haarman & Reimer, Hoffman-LaRoche, Jungbunzlauer, and Cerestar.
>
> * * *
>
> Q. And by the way, the company Cargill was a citric acid producer also, wasn't it?
>
> A. Yes, it was.
>
> Q. And I take it they were not part of the conspiracy?
>
> A. That is correct.

CRJN, Ex. A, at 2617-2618, 2674-2675.[4]

After the case had been fully briefed and argued in the court of appeals, petitioners submitted a second request for judicial notice. In the new request, petitioners sought to have the court take judicial notice of triple-hearsay assertions contained in an FBI report memorializing an interview that had been conducted with Barrie Cox in October 1996 at an early stage of the government's investigation. Cargill opposed that request, pointing out (1) that Cox had testified under oath that Cargill was not a member of the conspiracy,

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[4] Petitioners note that "Cargill requested that the Court of Appeals take judicial notice of new evidence developed in connection with the criminal cases" (Pet. 7), but they do not disclose that the evidence in question is precisely the Cox testimony quoted in text.

(2) that the contents of the report were triple hearsay and therefore inadmissible, (3) that the contents of the report were subject to reasonable dispute, and therefore not a proper subject for judicial notice under Fed. R. Evid. 201, and (4) that the statements attributed to Cox in the report lacked probative value in light of the government's repeatedly stated conclusion that "Cargill was not involved in price-fixing in citric acid." ORJN, Ex. B, at 5609. Indeed, in response to petitioners' attempt to rely on the FBI report, the government took the extraordinary step of writing a letter to Cargill's counsel confirming that Cargill and the Cargill employee mentioned in the report were "neither targets of, nor currently under investigation in, the Antitrust Division's investigation of possible criminal antitrust violations in the citric acid industry." *Id.*, Ex. A.

6. The court of appeals unanimously affirmed the judgment of the district court. Pet. App. A1-A32. The court recognized that it was "obligated to construe the evidence in the light most favorable to the non-moving party, to give the non-moving party the benefit of all reasonable inferences, and to refrain from making credibility determinations." *Id.* at A5. Nevertheless, the court agreed with the district court that petitioners' factual submissions simply could not survive summary judgment. *Id.* at A28-A29. The court found, first, that "there is no evidence to support [petitioners'] theory that these [ECAMA] meetings were used to pursue illegal ends." Pet. App. A11. Although the conspirators met at illegal meetings that were "often in the same city as, and within a few days of, officially scheduled ECAMA meetings[,] there is no evidence that illegal activities took place during ECAMA meetings attended by Cargill representatives. Nor is there evidence that Cargill participated in any of the 'unofficial' meetings." *Id.* at A11-A12.

The court next rejected petitioners' argument that "Cargill's failure to expand its production capacity more rapidly than it did constitutes circumstantial evidence that it

was conspiring to fix prices." Pet. App. A18. In addition to the fact that such an argument "does not fit with [petitioners'] theory of the conspiracy" (*ibid.*), the court pointed to the uncontroverted evidence in the record that "Cargill *did* expand rapidly." *Id.* at A19 (emphasis in original).

The court therefore concluded that "[c]onsidered as a whole, the evidence in the record * * * does not support a reasonable inference that *Cargill* was involved in the citric acid price fixing conspiracy." Pet. App. A29 (emphasis in original). Indeed, the court added, "there is no more than a scintilla of evidence that Cargill was a participant in the citric acid conspiracy" (*ibid.*).[5]

REASONS FOR DENYING THE PETITION

The decision of the court of appeals is a fact-bound evaluation of the sufficiency of a summary judgment record in what the court of appeals found to be a "unique" case governed by settled legal principles. Moreover, the decision of the court of appeals is indisputably correct. All four judges to have fully evaluated the record in this case have concluded that there is no evidence that could support a verdict in petitioners' favor. And when petitioners sought rehearing en banc in the Ninth Circuit, not one judge of that large court so much as requested the filing of a brief in response to petitioners' request.

Nor does the court of appeals' decision in this case conflict either with this Court's precedents or with the decision of any other court of appeals. In fact, the court below cited cases from virtually every circuit (including the

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[5] The court of appeals declined to decide petitioners' motion for judicial notice of the FBI report. The court noted that "[t]he arguments offered by Cargill against [petitioners'] request for judicial notice possess considerable force" (Pet. App. A27), but it ultimately concluded that it "need not resolve the dispute over whether judicial notice of this evidence would be proper" (*ibid.*) because "the documents [petitioners] seek[] to add to the record would not change the result in this case * * *." *Ibid.*

two courts with which petitioners assert a conflict) in support of the legal standard it applied. And, as the unanimity of the district court and the three judges of the court of appeals suggests, application of the governing standard to the facts of this case is not a controversial issue. In fact, both decisions below make clear that Cargill would be entitled to summary judgment even under the standard proposed by petitioners. The petition for certiorari should be denied.

A. The Court Of Appeals' Decision Applies Settled Law To The Facts Of This Particular Case And Does Not Conflict With Decisions Of This Court Or Of Any Other Circuit

1. Petitioners ask this Court to address the question "whether *Matsushita's* special summary judgment standard applies in cases where * * * the antitrust claim asserted by the plaintiff is neither implausible nor based on conduct by the defendant that is inherently procompetitive." Pet. i. In posing that question, petitioners fundamentally misread the *Matsushita* decision. *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), did not impose a "special summary judgment standard"; rather, it articulated a rule of substantive antitrust law: "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Id.* at 588. Thus, "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence that tends to exclude the possibility that the alleged conspirators acted independently." *Ibid.* (citation omitted, internal quotation marks omitted). It is ***that*** rule — the "tends to exclude" rule which applies exclusively to § 1 cases alleging an illegal conspiracy — with which petitioners disagree. This Court made clear in *Matsushita*, however, that the "tends to exclude" rule is one

of substantive "antitrust law" (*ibid.*), not a procedural rule governing the summary judgment standard.

Nor is it true, as petitioners suggest (Pet. 18), that the "tends to exclude" rule applies only when plaintiffs allege the existence of a conspiracy that is facially implausible. It is true that, on the facts of *Matsushita*, the "petitioners had no motive to enter into the alleged conspiracy." 475 U.S. at 595. But this Court's precedents definitively establish that the "tends to exclude" rule applies to all § 1 cases — plausible and implausible alike.

The first and most important confirmation that the "tends to exclude" rule applies to plausible conspiracies can be found in the case that first articulated the rule — a case that petitioners fail to cite anywhere in their petition. Two years before *Matsushita*, this Court decided *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984). *Monsanto* involved allegations of a wholly plausible conspiracy between a manufacturer and its distributors to fix the resale price of the manufacturer's products. A terminated distributor alleged that its distributorship had been terminated because it had engaged in price cutting. As support for its claim, the distributor showed that it had been terminated following pricing complaints by other distributors to Monsanto. Concerned that allowing antitrust liability to be predicated on such ambiguous evidence "could deter or penalize perfectly legitimate conduct" (*id.* at 763), the Court held that "something more * * * is needed." *Id.* at 764. It was in that context of a plausible conspiracy that the Court first articulated the rule that "[t]here must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." *Ibid.*

Given the origin of the "tends to exclude" rule, there could have been very little doubt that the rule applied to facially plausible conspiracies. Nevertheless, because of the odd factual context of *Matsushita*, the Court took special

pains in that case to ensure that no one could possibly interpret its holding as limiting the rule to implausible conspiracies:

> We do not imply that, if petitioners had had a plausible reason to conspire, ambiguous conduct could suffice to create a triable issue of conspiracy. Our decision in [*Monsanto*] establishes that conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy.

Matsushita, 475 U.S. at 597 n.21. *Monsanto* and *Matsushita* therefore leave no room for doubt that the rule requiring an antitrust plaintiff alleging a conspiracy in a § 1 case to provide evidence that tends to exclude the possibility of independent action applies in ***all*** cases, not just those alleging implausible conspiracies.

2. Despite petitioners' claims to the contrary (Pet. 17-18), this Court's decision in *Eastman Kodak Co.* v. *Image Tech. Servs.*, 504 U.S. 451 (1992), did not alter the rule in *Monsanto* and *Matsushita*. Nor could it have, for the question of conspiratorial versus independent conduct was not even presented in that case, which involved allegations that Kodak had illegally tied Kodak service to Kodak parts and had monopolized the service market for certain Kodak equipment. True, the Court in *Kodak* stated that "*Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision." *Kodak*, 504 U.S. at 468. But that remark referred not to *Matsushita*'s discussion of § 1 conspiracy law, but to its discussion of the application of settled summary judgment principles. *Matsushita* had announced the "settled principle[] that if the factual context renders respondents' claim implausible — if the claim is one that simply makes no economic sense — respondents must come forward with more persua-

sive evidence to support their claim than would otherwise be necessary." *Matsushita*, 475 U.S. at 587. Kodak had argued that it was entitled to the benefit of that rule. See *Kodak*, 504 U.S. at 467 ("according to Kodak, * * * the existence of market power in the service and parts markets absent power in the equipment market simply makes no economic sense") (internal quotation marks omitted). In addressing that argument, the Court in *Kodak* explained that *Matsushita* had not changed settled summary judgment law; it "did not hold that if the moving party enunciates *any* economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment." *Id.* at 468 (emphasis in original). Thus, upon finding that Kodak's economic theory did not reflect the reality of the marketplace, the Court was obligated to affirm the Ninth Circuit's reversal of the summary judgment in Kodak's favor.

But the Court never even addressed, let alone purported to disturb, the settled rule of antitrust law in § 1 cases that plaintiffs must present evidence that "tends to exclude the possibility" of independent action. That phrase does not appear in the Court's opinion — which is not surprising, because the issue of the existence of a conspiracy was not even presented to the Court in *Kodak*.

That is precisely what the court below recognized when petitioners sought rehearing under the theory that its decision was in conflict with *Kodak*. The court explained that "*Kodak* was not concerned with the sufficiency of evidence of conspiratorial acts alleged under § 1 of the Sherman Act," and that it could not possibly have overruled the "tends to exclude" rule of *Monsanto* and *Matsushita*. Pet. App. A68. Petitioners challenge that distinction (Pet. 22), but it is quite plainly correct. Whereas *Kodak* addressed the standard for summary judgment in an antitrust case, *Monsanto* addressed the limits that substantive antitrust law places on the inferences to be drawn from ambiguous evidence. Whether

antitrust law permits a given inference to be drawn is quite different from applying the summary judgment standard to determine whether that inference is one that a reasonable jury might reach.

3. Petitioners contend, finally, that the courts of appeals are in conflict on the question whether the "tends to exclude" rule applies only to facially implausible conspiracies. See Pet. 22-30. That is simply not so. In fact, every single circuit has quoted and faithfully applied the "tends to exclude" rule in § 1 conspiracy cases. See, *e.g.*, *Computer Identics Corp.* v. *Southern Pacific Co.*, 756 F.2d 200, 203 (1st Cir. 1985); *Clorox Co.* v. *Sterling Winthrop, Inc.*, 117 F.3d 50, 55 (2d Cir. 1997); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 124 (3d Cir. 1999); *Service & Training, Inc.* v. *Data General Corp.*, 963 F.2d 680, 685 (4th Cir. 1992); *Stewart Glass & Mirror, Inc.* v. *U.S. Auto Glass Discount Centers, Inc.*, 200 F.3d 307, 2000 WL 6157, *3 (5th Cir. Jan. 6, 2000); *American Council of Certified Podiatric Physicians & Surgeons* v. *American Bd. of Podiatric Surgery, Inc.*, 185 F.3d 606, 619 (6th Cir. 1999); *Reserve Supply Corp.* v. *Owens-Corning Fiberglass Corp.*, 971 F.2d 37, 49 (7th Cir. 1992); *Corner Pocket of Sioux Falls, Inc.* v. *Video Lottery Tech., Inc.*, 123 F.3d 1107, 1112 (8th Cir. 1997); Pet. App. A5; *Mitchael* v. *Instacorp, Inc.*, 179 F.3d 847, 858 (10th Cir. 1999); *City of Tuscaloosa* v. *Harcros Chem., Inc.*, 158 F.3d 548, 570 (11th Cir. 1999); *Ostrzenski* v. *Columbia Hosp. for Women Found., Inc.*, 158 F.3d 1289, 1290 (D.C. Cir. 1998). The leading commentators are also in agreement. See II P. Areeda & H. Hovenkamp, ANTITRUST LAW ¶ 322, at 70-72 (1995) ("when the evidence is in equipoise * * * summary judgment will be granted [to the defendant]").[6]

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[6] On February 17, 2000, the Eighth Circuit issued an en banc opinion that further illustrates the uniform acceptance of the "tends to exclude" rule. See *Blomkest Fertilizer, Inc.* v. *Potash Corp. of Saskatchewan, Inc.*, no. 97-1330. In that case, the Eighth Circuit

The Third Circuit's decision in *Petruzzi's IGA Supermarkets, Inc.* v. *Darling-Delaware Co.*, 998 F.2d 1224 (1993), is fully in accord. In that case, the court of appeals reversed the district court's grant of summary judgment as to two of the three defendants on facts far removed from the present case. It is true that the court engaged in a discussion of *Matsushita*, and it cited the *Kodak* decision during that extensive discussion. See *id.* at 1230-1233. But there is no hint that the Third Circuit thought that *Kodak* had worked a dramatic change in antitrust conspiracy law. Indeed, the court flatly rejected the contention — on which petitioners

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affirmed summary judgment for the defendants in a § 1 conspiracy case. Although the court split 6-5 on the application of the governing standard to the facts of that case, the decision confirms the consistency of the law in this area. Three features about the opinion make it significant in evaluating petitioners' claims. First, both the majority and dissent agreed that the governing legal standard was the "tends to exclude" rule. Compare slip op. at 6 ("In order to state a section 1 case, plaintiffs must present evidence that tends to exclude the possibility of independent action by the defendants.") (internal quotation marks omitted) with *id.* at 32 ("The question is whether the additional evidence tends to exclude the possibility that the producers acted independently.") (dissenting opinion of John R. Gibson, J.). Second, neither the majority nor the dissent so much as cited this Court's decision in *Kodak* — a fact that confirms the court of appeals' conclusion in this case that *Kodak* is not relevant to the "tends to exclude" rule. Finally, the opinion underscored the uncontroversial nature of the holding in this case. Even the dissent recognized that this case involves nothing more than the routine application of established summary judgment principles:

> The court * * * concluded the case by saying that there was no more than a scintilla of evidence that Cargill participated in the conspiracy. ***In re Citric Acid* is therefore consistent with the ordinary summary judgment standard in cases requiring a preponderance of evidence, and it does not stand for the proposition that a heightened standard of proof is necessary to survive summary judgment in antitrust cases.**

Id. at 39 (dissenting opinion of John R. Gibson, J.) (citation omitted) (bold emphasis added).

now rely — that antitrust plaintiffs alleging a facially plausible conspiracy should be freed from the "tends to exclude" rule:

> [T]he mere facts that a plaintiff alleges a plausible conspiracy and that that allegation does not threaten to chill procompetitive behavior do not mean that there are no restrictions on the inferences that can be drawn from the evidence it puts forward. * * * Instead, in a conscious parallelism case, a plaintiff also must demonstrate the existence of certain "plus" factors, for ***only when these additional factors are present does the evidence tend to exclude the possibility that the defendants acted independently***.

Id. at 1232 (emphasis added).

That is the very standard employed by the court of appeals in this case. Although the *Petruzzi* court reversed the summary judgment as to two of the defendants before it on a radically different factual record, the two courts employed the same legal test. Compare *id.* at 1228 (affirming grant of summary judgment as to third defendant because "we agree that the evidence put forward does not tend to exclude the possibility that Standard acted independently") with Pet. App. A28-A29 (affirming grant of summary judgment for Cargill because "[c]onsidered as a whole, the evidence in the record * * * does not tend to exclude the possibility that Cargill acted independently").

Were there any lingering doubt about the matter, the Third Circuit has much more recently decided an antitrust conspiracy case in which it affirmed summary judgment for the defendant on a record considerably more favorable to the plaintiffs than the one in this case. See *In re Baby Food Antitrust Litig.*, 166 F.3d 112 (3d Cir. 1999). In that case, there was evidence that sales representatives of competing firms had exchanged future price information with each other (*id.* at 119), and that the defendants obtained advance notice

of each other's price increases. *Ibid.* Nevertheless, the Third Circuit affirmed the summary judgment for the defendants, in part because "no conspiracy should be inferred from ambiguous evidence or from mere parallelism when defendants' conduct can be explained by independent business reasons" (*id.* at 122), and in part because the plaintiffs "failed to produce sufficient circumstantial evidence to prove concerted collusion that tends to exclude the possibility of independent action." *Id.* at 138. There simply is no conflict between the Third and Ninth Circuits on this issue.[7]

Petitioners come no nearer the mark in their claim that the Seventh Circuit applies a conflicting legal standard. To the contrary, in its post-*Kodak* decision of *Reserve Supply Corp.* v. *Owens-Corning Fiberglass Corp.*, 971 F.2d 37 (7th Cir. 1992), the Seventh Circuit emphasized that "there must be evidence that tends to exclude the possibility that the alleged conspirators acted independently." *Id.* at 49 (internal quotation marks omitted). Neither *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599 (7th Cir. 1997), nor *JTC Petroleum Co.* v. *Piasa Motor Fuels, Inc.*, 190 F.3d 775 (7th Cir. 1999), holds otherwise. Rather, in each of those cases Chief Judge Posner, writing for the court, addressed the plausibility of the alleged conspiracy only because the defendants had specifically argued that they

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[7] In attempting to augment their alleged circuit conflict, petitioners emphasize what they deem an "intracircuit conflict" (Pet. 26) within the Ninth Circuit, asserting that this case conflicts with *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig.*, 906 F.2d 432 (9th Cir. 1990). Petitioners claim that the Ninth Circuit's decision not to follow certain dicta in *Petroleum Products* was "ill-considered and incorrect." Pet. 9 n.6. Of course, petitioners raised that exact claim in their petition for rehearing en banc in the Ninth Circuit, and no judge of that court even requested that a responsive brief be filed. Moreover, even if an intracircuit conflict existed, that would be no argument for a grant of certiorari here. See *United States* v. *Wisniewski*, 353 U.S. 901 (1957).

were entitled to summary judgment on the basis that the conspiracy made no economic sense. See 123 F.3d at 614 (addressing defendants' argument "that summary judgment for a defendant is proper, even if there is some evidence of an antitrust violation, if the plaintiff's theory of violation makes no economic sense"); 190 F.3d at 778. The fact that the court concluded that the conspiracy in those cases did make economic sense — and that the defendants were accordingly not entitled to summary judgment on that basis — does nothing either to cabin the "tends to exclude" rule or to conflict with the decision here.[8]

In short, the courts of appeals apply the "tends to exclude" rule in the same way; there is no circuit conflict regarding the legal standard. That is perhaps one reason why this Court has denied the numerous petitions citing the same false conflict that petitioners rely on here. See, *e.g.*, *Moyer Packing Co.* v. *Petruzzi's IGA Supermarkets Inc.*, No. 93-601, 510 U.S. 994 (1993); *Corner Pocket of Sioux Falls, Inc.* v. *Powerhouse Tech., Inc.*, No. 97-1097, 522 U.S. 1117 (1998); *Harcros Chemicals, Inc.* v. *City of Tuscaloosa*, No. 98-1997, 120 S. Ct. 309 (1999); *Super Sulky, Inc.* v. *United States Trotting Ass'n*, No. 99-67, 120 S. Ct. 172 (1999). The petition for a writ of certiorari should be denied here as well.

B. Even If This Court Were Inclined To Revisit Otherwise Settled Principles Of Antitrust Conspiracy Law, This Case Presents An Inappropriate Vehicle In Which To Do So

This case is an unsuitable vehicle for reconsidering the "tends to exclude" rule for at least two reasons. First,

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[8] Citing an unpublished decision from the Fourth Circuit, petitioners also state that that court has adopted an aberrant standard. Again, they are taking snippets of language out of context; the Fourth Circuit applies the "tends to exclude" rule in the same way every other court does.

although the court of appeals cited and faithfully applied the rule in this case, it is quite clear from its opinion, and from the opinion of the district court, that summary judgment would have been granted to Cargill and affirmed even if the "tends to exclude" rule had never existed. Second, because petitioners rely extensively upon materials outside the record, resolution of this case would embroil this Court in an array of collateral issues regarding the admissibility of several pieces of evidence.

1. Although petitioners quibble with application of the "tends to exclude" rule in this case, they have not demonstrated that the result would have been any different if the courts below had applied the rule of law they advocate in this Court. In fact, the record amply demonstrates that the issue set forth in the petition is not truly presented here; Cargill clearly would be entitled to judgment as a matter of law under the standard articulated by the petitioners.

Indeed, the district court — believing that it was bound by the dicta in *Petroleum Products* — applied the very rule of law sought by petitioners here, and concluded that Fed. R. Civ. P. 56 mandated entry of summary judgment in Cargill's favor. See, *e.g.*, Pet. App. A47 ("no reasonable jury could find that Cargill was a participant" in the citric acid price-fixing conspiracy); *id.* at A53 ("plaintiffs' evidence is insufficient to create a genuine issue of material fact"); *id.* at A65 ("even drawing all inferences in plaintiffs' favor, as the Court must, the evidence in this case fails to raise any genuine issue of fact that defendant Cargill was a member of the conspiracy to fix citric acid prices"); *ibid.* ("Drawing an inference of conspiracy from the evidence proffered by plaintiffs would require the sort of speculation and guesswork that the Court is forbidden to undertake."); *id.* at A66 ("no reasonable jury could, on the basis of this record, conclude that defendant Cargill was a member of the conspiracy").

That conclusion is confirmed by the opinion of the court of appeals. Although the Ninth Circuit applied this Court's "tends to exclude" rule, its decision leaves no doubt that the court of appeals would have reached the same result in the absence of the rule. See, *e.g.*, Pet. App. A4 ("the essential question in this case is whether [petitioners'] circumstantial evidence is sufficient to permit a reasonable factfinder to conclude that Cargill was a participant in the citric acid conspiracy"); *id.* at A11 ("the crucial question is whether all the evidence considered as a whole can reasonably support the inference that Cargill conspired with the admitted conspirators to fix prices"); *id.* at A28 ("none of the various pieces of evidence offered by [petitioners] supports a reasonable inference that Cargill conspired to fix prices"); *id.* at A29 ("[c]onsidered as a whole, the evidence in the record * * * does not support a reasonable inference that *Cargill* was involved in the citric acid price fixing conspiracy") (emphasis in original). In the final analysis, the court of appeals was forced to conclude that "there is no more than a scintilla of evidence that Cargill was a participant in the citric acid conspiracy." *Ibid.*

In the end, all four judges that have reviewed the record in this case unanimously concluded that summary judgment for Cargill was warranted — not simply because of the "tends to exclude" rule, but also because of the plain language of Rule 56. Not a single member of the en banc court voted to rehear this issue, notwithstanding petitioners' presentation of the very same arguments now raised in the petition for certiorari. There simply is no version of the summary judgment test under which the evidence in this record would entitle petitioners to a jury trial.

2. It may be added that petitioners' factual quarrel with the two lower courts rests primarily on two pieces of "evidence" that are not even in the summary judgment record. Petitioners evidently believe that their presentation of the legal issues depends on this Court's consideration of

both pieces of proof. That is yet another reason why this case would be an inappropriate vehicle in which to reconsider the "tends to exclude" rule.

Petitioners rely most heavily upon the FBI report, which they also include in the appendix to the petition. In that report, created early in the government's investigation, an FBI agent wrote down his impressions of what ADM conspirator Barrie Cox said that a Cargill employee said to him during various phone conversations. The document itself confirms that Cargill was not in the citric acid conspiracy, but petitioners cite it as purported evidence of bid rigging at certain accounts. Petitioners decline, however, to reveal many relevant facts concerning the document. First, they omit to mention that the document was never submitted to the district court, and that it was provided to the court of appeals only after oral argument had taken place. Second, petitioners do not explain what exceptions could possibly allow the triple-hearsay statements on which they rely to be considered as evidence. Third, they do not reveal that the government itself, after full investigation, repudiated the report by concluding that "Cargill was not involved in price-fixing in citric acid" (ORJN, Ex. B, at 5609). The government also took pains to confirm that Cargill and the Cargill employee mentioned in the report were "neither targets of, nor currently under investigation in, the Antitrust Division's investigation of possible criminal antitrust violations in the citric acid industry." *Id.*, Ex. A. Finally, they do not reveal that the court of appeals did not grant their motion to supplement the record with or to take judicial notice of the document. Although the court acknowledged that Cargill's arguments against petitioners' motion "possess considerable force" (Pet. App. A27), the court declined to resolve petitioners' motion because "the documents [petitioners] seek[] to add to the record would not change the result in this case." *Ibid.*

Petitioners also rely heavily on their allegation that "Cargill's market share, which until 1993 had risen meteorically, dipped slightly and then remained flat." Pet. 4. According to the petitioners, Cargill's declining market share is evidence that it became a citric acid conspirator by joining ECAMA. Not only is there no evidence in the record to support this factual assertion, but both the district court and the court of appeals emphatically rejected it.

The district court expressly found that "[t]he evidence * * * indicates that although the growth rate of Cargill's market share slowed during the years of the conspiracy, the share nevertheless increased more than two percent between 1993 and 1995." Pet. App. A64. The court of appeals likewise found that "there is no evidence in the record supporting [petitioners'] claim that Cargill's market share flattened after 1993." *Ibid.* To the contrary, "the only market share data actually in the record — and thus the only data properly before this court — indicates that Cargill's market share continued to increase even after 1993." *Id.* at A21 n.7.[9]

Because petitioners' claim rests so heavily upon material outside the record, this case would inevitably enmesh the Court in a tangle of entirely collateral evidentiary matters. For that reason as well, the petition should be denied.

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[9] Of course, even if the record evidence supported petitioners' market share claim, that would be of no avail because, as the court of appeals noted, "it is not reasonable to infer that a firm is engaging in illegal activities merely from the fact that it failed to continue to increase market share." Pet. App. A19.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

GANGI BROS. PACKING COMPANY, 7-UP BOTTLING COMPANY OF PHILADELPHIA, INC., 7-UP BOTTLING COMPANY OF SAN FRANCISCO, SOUTHEASTERN SPECIALTY FOODS CORP., TRANS-PACKERS SERVICES CORP., AND VARNI BROTHERS CORPORATION, DBA SEVEN-UP BOTTLING OF MODESTO, on behalf of themselves and all others similarly situated,

Petitioners,

v.

CARGILL, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE STATE OF CALIFORNIA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS GANGI BROS. PACKING COMPANY, ET AL.

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QUESTION PRESENTED

The Court may wish to consider this alternate formulation of the question presented by petitioner:

> 1. Whether antitrust plaintiffs in horizontal price-fixing cases are to be denied the protection of the general rule that evidence must be construed in the light most favorable to the nonmoving party in a summary judgment proceeding when defendants assert that their actions are innocent or inconsistent with the existence of a conspiracy?

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INTEREST OF AMICUS

Price-fixing conspiracies are famously difficult to discover and prove. Because of the practical difficulty of cracking these conspiracies, antitrust law has developed an extensive jurisprudence concerning the evidence, particularly circumstantial evidence, that will support a finding that a "combination" exists within the meaning of the Sherman Act.

Here, however, the lower court selectively invoked this Court's decision in *Matsushita* to allow defendants to prevail at summary judgment in a price-fixing case by making a facial showing that their actions could be consistent with legal as well as illegal activity. Fundamentally, the lower court erred by failing to resolve disputed, reasonable inferences to be drawn from circumstantial evidence in favor of plaintiffs before deciding summary judgment.

This is directly contrary to the general rule that defendant meets its burden under Rule 56 only when it "conclusively show[s] that the facts upon which [the plaintiff] relied to support his allegation were not susceptible of the interpretation which he sought to give them." *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-289 (1968). It is also contrary to this Court's view that the decisional calculus in antitrust summary judgment proceedings must be grounded on a policy "that illegal conspiracies be identified and punished", *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986). It is also in conflict with this Court's conclusion in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 468 (1992), that it is a fallacy that "if the

moving party enunciates *any* economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment." Finally, the lower court's decision is in conflict with considered decisions of the Third and Seventh Circuits. *Petruzzi's IGA Supermarkets, Inc. v. Darling Delaware* Co., 998 F.2d 1224 (3d Cir. 1993); *JTC Petroleum Co. v. Piasa Motor Fuels, Inc.*, 190 F.3d 775, 778-79 (7th Cir. 1999); *In re Brand Name Prescription Drugs Litig.*, 123 F.3d 599 (7th Cir. 1997), *cert. denied*, 522 U.S. 1153 (1998).

The State of California has a strong interest in clarifying the rules of inference to be applied to summary judgment proceedings in price-fixing cases. As a practical matter, if allowed to stand, the lower court's decision will make price-fixing conspiracies in the Ninth Circuit more difficult to root out by private plaintiffs and public agencies. This will allow some number of price-fixers to evade accountability for their unlawful conduct. This in turn will impose unnecessary and unlawful costs on California's consumers and industries.

SUMMARY OF ARGUMENT

The lower court's decision is in conflict with important decisions of this Court as well as thoughtful decisions of the Third and Seventh Circuits. These conflicts go to the heart of the methodology for proving the existence of a "contract, combination . . . or conspiracy", the essential first step in establishing a violation of section 1 of the Sherman Act. 15 U.S.C. § 1. These conflicts create fundamental problems in the administration of the

nation's most important antitrust law, the Sherman Act. Moreover, the decisional calculus reflected in the lower court's decision will have the practical effect of making it more difficult for public agencies as well as private plaintiffs to root out price-fixing. This will have a dramatic, negative effect on consumers and businesses throughout the nation. For these reasons, amicus curiae State of California respectfully requests that the petition be granted.

ARGUMENT

I. The Decision of the Lower Court Directly Conflicts with the Decisions of this Court in *Matsushita* and *Kodak*.

In *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), this Court addressed the standards of proof and persuasion applicable to a summary judgment motion in a predatory pricing case in which the alleged antitrust violation involved potentially beneficial price-cutting and a facially improbable economic theory. The Court made plain that is was not announcing a special rule for all antitrust cases. Rather, the decision announced a flexible rule that allowed trial courts to take into account the plausibility of the underlying violation and the danger such violations might pose to the public. *Id.* at 594-95.

This view was underscored by the Court's decision in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992). There, in a case in which the potential violation was not improbable or self-correcting, this Court concluded that "when we weigh the risk of deterring

procompetitive behavior by proceeding to trial against the risk that illegal behavior will go unpunished, the balance tips against summary judgment." *Id.* at 479. Indeed, the Court concluded that:

> The Court's requirement in *Matsushita* that the plaintiffs' claims make economic sense did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases. The Court did not hold that if the moving party enunciates *any* economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment. *Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision. *Id.* at 468 (emphasis in the original).

This Court then cited with approval *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-289 (1968), which stated the ordinary rule that defendant meets its burden under Rule 56 only when it "conclusively show[s] that the facts upon which [the plaintiff] relied to support his allegation were not susceptible of the interpretation which he sought to give them." *Id.* at 468, n. 14. As Judge Posner of the Seventh Circuit observed in a case similar to this one:

> . . . the issue before us is not whether [defendants] were in fact participants in the price-fixing conspiracy; it is whether there is sufficient evidence of this to create a triable issue. In deciding this question we must construe the evidence as favorably to the plaintiffs as the

> record permits, not as favorably to the defendants as it permits. The defendants' interpretations may be correct; they are not inevitable. *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 614 (7th Cir. 1997), *cert. denied*, 522 U.S. 1153 (1998).

The lower courts appeared to ignore these decisions. The trial court started with the premise that *Matsushita* created a "special rule" imposing an additional burden on plaintiffs at summary judgment in antitrust cases. *In re Citric Acid Litigation*, 996 F.Supp. 951, 954 (N.D. Cal. 1998). The circuit court repeatedly dismissed plaintiffs' evidence of conspiracy if there was any alternate, innocent explanation for the behavior. For example, disclosure of detailed sales figures to a European trade association populated by admitted members of the citric acid price-fixing cartel who used sales data to police the cartel was dismissed because defendant's participation might allow it to "get a better picture of world supply and demand conditions." *In re Citric Acid Litigation*, 191 F.3d 1090, 1100 (9th Cir. 1999). Meetings and conversations between defendant's executives and known members of the cartel were insufficient to allow plaintiffs to go to a jury because plaintiffs cannot prove that prices were fixed at these meetings. *Id.* at 1103. "[S]poradic price discussions" between an executive in defendant's company and executives in other companies, admittedly part of the conspiracy, could not go to a jury because they were not "probative" of the "conspiracy alleged". *Id.* at 1105.

As Judge Posner observed in *Prescription Drugs*, the fact that there may be an innocent explanation for the behavior of a defendant in a price-fixing case does not

mean that plaintiff does not get the chance to prove its case to a jury. The issue, therefore, is not whether there is a potential innocent explanation, but whether plaintiff's view of such evidence is unreasonable. In a case involving horizontal price-fixing and a not improbable violation of law, the lower court's casual dismissal of plaintiffs' circumstantial evidence of price-fixing conflicts with both *Matsushita* and *Kodak*.

II. The Third and Seventh Circuits Are in Substantial Conflict with at least the Fourth, Eighth and Ninth Circuits Over the Summary Judgment Standard to be Applied in Antitrust Cases.

The circuit courts have splintered on the meaning of this Court's decisions in *Matsushita* and *Kodak*. In *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1232 (3d Cir. 1993), the Third Circuit concluded that the reasonableness of plaintiffs' inferences was at the heart of *Matsushita*, and that "the acceptable inferences which can be drawn from circumstantial evidence vary with the plausibility of the plaintiffs' theory and the dangers associated with such inferences." Taking into account the fact that the case before it involved horizontal price-fixing, the *Petruzzi* court determined that the alleged conspiracy "would enable [putative conspirators] to make profits that the free market would not allow them, in both the short-run and long-run." *Id.*

In *JTC Petroleum Co. v. Piasa Motor Fuels, Inc.*, 190 F.3d 775, 778-79 (7th Cir. 1999), Judge Posner opined for the Seventh Circuit that *Matsushita* had to be understood as a case involving an antitrust claim that made "no economic

sense". As a consequence, in a garden-variety price-fixing case, plaintiffs should be given normal leeway to infer the existence of a conspiracy even if defendants offered an "innocent explanation" of their behavior. *Id.*

Similarly, in *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599 (7th Cir. 1997), *cert. denied*, 522 U.S. 1153 (1998), Judge Posner reversed a grant of summary judgment when plaintiffs' inferences of the existence of a price-fixing conspiracy were reasonable. He concluded that it is was not enough that "defendants' interpretations may be correct". *Id.* at 614. Fundamentally, he found that in determining whether there is a "triable issue", a court "must construe the evidence as favorably to the plaintiffs as the evidence permits, not as favorably to the defendants as it permits".

The Sixth Circuit appears to have taken a similar approach in *Ezzo's Invs. v. Royal Beauty Supply*, 94 F.3d 1032 (6th Cir. 1996). In that case, the court determined that evidence that did "not preclude an inference that [defendants] agreed" was sufficient to take the case to the jury. However, a more recent case appears to align this circuit with the Fourth and Eighth Circuits. *Super Sulky, Inc. v. United States Trotting Ass'n*, 174 F.3d 733 (6th Cir.), *cert. denied*, 145 L.Ed. 2d 146 (1999).

The Fourth Circuit takes the view that at summary judgment, a plaintiff must apparently conclusively prove that there was no innocent explanation for defendants' allegedly anticompetitive conduct. *Thompson Everett, Inc v. National Cable Advertising, L.P.*, 57 F.3d 1317, 1323 (4th Cir. 1995). And the Eighth Circuit grants a presumption in favor of defendants by requiring lower courts to "not

lightly disregard" business justifications of putative price-fixers. *Corner Pocket of Sioux Falls v. Video Lottery Techs., Inc.*, 123 F.3d 1107, 1109 (8th Cir. 1997), *cert. denied*, 522 U.S. 1117 (1998).

Taken together, the federal circuits are in substantial disarray over the standard to be applied to summary judgment decisions involving antitrust claims, particularly claims like the one at issue here of horizontal price-fixing.

III. Resolution of These Mature Conflicts is Essential to Effective Public and Private Enforcement of the Sherman Act.

Finding the existence of a "contract, combination . . . or conspiracy" is a threshold requirement of price-fixing and other "hard core" violations of section 1 of the Sherman Act. To have the federal circuits in such disarray on the ways and means by which this critical element of antitrust law is proven or disproven in summary judgment proceedings goes to the heart of consistency in the federal system. These conflicts are mature in the sense that the circuits have considered, though conflicting, positions on the meaning of this Court's decisions in *Matsushita* and *Kodak*.

As a practical matter, the lower court's decision will have a chilling effect on public and private enforcement of the antitrust laws. Circumstantial evidence is critical to proving up the existence of most price-fixing conspiracies. Indeed, "it is axiomatic that the typical conspiracy is 'rarely evidenced by explicit agreements' but must almost always be proved by 'inferences that may be

drawn from the behavior of the alleged conspirators' ". *ES Dev., Inc. v. RWM Enters.*, 939 F.2d 547, 553-54 (8th Cir. 1991). Because such inferences are so crucial, the lower court's decision to grant summary judgment to defendants if they come up with a potentially non-conspiratorial explanation of their conduct will hamstring antitrust enforcement.

For this reason, amicus curiae State of California favors the formulation articulated by Judge Posner in *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599 (7th Cir. 1997), *cert. denied*, 522 U.S. 1153 (1998). This appears to reconcile the conflicting demands of traditional Rule 56 standards and the policy interests of courts and defendants in rooting out odd or illogical antitrust claims early in the judicial process. It also provides a reasonable calculus which will allow public agencies to pursue harmful price-fixing conspiracies in civil actions under the Sherman Act.

Notwithstanding our support for this standard, resolution of the current circuit conflicts strongly militates in favor of granting certiorari in this case. Specifically, the range of circumstantial evidence proffered by plaintiffs gives this Court an opportunity to write dispositively on the treatment of various forms of classic circumstantial evidence of conspiracy.

CONCLUSION

For the foregoing reasons, the Petition For a Writ of Certiorari sought by Gangi Bros. Packing Co., et al. should be granted.

Respectfully submitted,

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